Supreme Court, U.S.
FILED

95-1829 FEB 26 1996

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

CONRAD MOCK and BARBARA MOCK,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

KEVEN J. COAKLEY
Counsel of Record
ERNEST W. SCHOELLKOPFF
CONNELL, FOLEY & GEISER
Attorneys for Petitioners
85 Livingston Avenue
Roseland, New Jersey 07068
(201) 535-0500

8271
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

92 pp

QUESTIONS PRESENTED

1. Is categorical treatment of regulatory action which denies all economically beneficial or productive use of land appropriate for "as applied" as well as facial takings challenges under the Fifth Amendment?

2. Where property owners produce uncontroverted evidence that denial of a permit has rendered a property valueless, does the government bear the burden of presenting evidence of practicable and reasonably probable uses in order to avert a taking?

3. Where denial of a permit has rendered property valueless, does the Pennsylvania courts' requirement that property owners must affirmatively foreclose all possibility of alternative use, however speculative, vitiate the Fifth Amendment guarantee against takings without just compensation?

4. Are the landowners' investment-backed expectations to be considered in cases of categorical regulatory takings, and if so, were those expectations of petitioners frustrated by their inability to develop commercially zoned property because of wetlands restrictions enacted long after the property was purchased?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
I. The Pennsylvania courts have declined to follow this Court's standard for determining categorical takings of property rendered valueless by the denial of a wetlands fill permit, contrary to *Lucas v. South Carolina Coastal Council.*	9
II. Pennsylvania has sought to avoid this Court's categorical takings rule by imposing on the property owner an uncertain and potentially interminable burden of excluding all economically viable use in the permit application process.	12
III. In the constitutional determination of economically viable use, the burden of production	

Contents

Page

must be shifted to the government once the landowners have submitted unrebutted evidence that their property is valueless. 14

IV. The Pennsylvania courts have skewed the takings analysis to deny just compensation by confusing the substantive determination of economically viable use with the ripeness requirement. 16

V. The state and federal courts require clarification whether investment-backed expectations remain as a factor to be considered or are subsumed in a finding of a categorical taking. 19

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Agins v. Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) 9

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) 18

Dolan v. City of Tigard, __ U.S. __, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) 16

Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995) 18, 19

Contents

Page

Formanek v. United States, 26 Cl. Ct. 332 (1992) 18

Herrington v. County of Sonoma, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S. Ct. 1557, 103 L. Ed. 2d 860 (1989) 17

Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) 10, 11, 14, 15, 18, 19

Lucas v. South Carolina Coastal Council, 508 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) . 8, 9, 10, 11, 15, 19

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) 16, 17, 18

Olson v. United States, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934) 15

Parkview Corp. v. Department of Army, 490 F. Supp. 1278 (E.D. Wis. 1980) 17

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) 18

United States v. 341.45 Acres of Land, 633 F.2d 108 (8th Cir. 1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938, 101 S. Ct. 2017, 68 L. Ed. 2d 324 (1981) 15

Contents

Page

Statute Cited:

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

Fifth Amendment .....i, 2, 6, 16

Fourteenth Amendment 2

Other Authority Cited:

C. McCormick, *McCormick on Evidence* § 338 (3d ed. 1984) 14, 15

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania, November 22, 1995 ..... 1a

Appendix B — Order of the Commonwealth Court of Pennsylvania, March 25, 1993 ..... 3a

Appendix C — Opinion of the Commonwealth Court of Pennsylvania Filed March 25, 1993 ..... 4a

Appendix D — Dissenting Opinion of Judge Kelley in the Commonwealth Court of Pennsylvania Filed March 25, 1993 ..... 27a

Contents

Page

Appendix E — Commonwealth of Pennsylvania Environmental Hearing Board Adjudication Issued May 1, 1992 ..... 30a

Appendix F — Commonwealth of Pennsylvania Environmental Hearing Board, Concurring Opinion of Board Member Terrance J. Fitzpatrick Issued May 1, 1992 ..... 60a

Appendix G — Letter of Joseph J. Ellam, Acting Director, Bureau of Dams and Waterway Management, Commonwealth of Pennsylvania Department of Environmental Resources, Denying Permit Application No. E 09-357 Dated April 12, 1990 .... 63a

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania, affirming the order of the Commonwealth Court of Pennsylvania, is reported at 667 A.2d 212 and is reprinted in the appendix hereto, p. 1a, *infra*.

The order and opinion of the Commonwealth Court of Pennsylvania are reported at 154 Pa. Cmwlth. 380 and at 623 A.2d 940, and are reprinted in the appendix hereto, p. 3a and p. 4a, *infra*, with the dissenting opinion of Judge Kelley at p. 27a.

The adjudication and order of the Commonwealth of Pennsylvania Environmental Hearing Board have not been reported. They are reprinted in the appendix hereto, p. 30a, *infra*, with the concurring opinion of board member Terrence J. Fitzpatrick at p. 60a.

The letter of the Bureau of Dams and Waterway Management, Commonwealth of Pennsylvania Department of Environmental Resources, denying petitioners' encroachment permit application is reprinted in the appendix hereto, p. 63a, *infra*.

STATEMENT OF JURISDICTION

The petitioners, Conrad Mock and Barbara Mock, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered on November 22, 1995, affirming the order entered with opinion by the Commonwealth Court of Pennsylvania. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Conrad and Barbara Mock are part-owners of a 5.2- acre tract purchased in February of 1963 as a long-term investment. The property is on the east side of Easton Road (U.S. Route 611) just north of Doylestown, in Plumstead Township, Bucks County, Pennsylvania. The Pine Run Creek runs roughly parallel to the northern boundary of the property. The property is located in an area designated as a C-2 Highway Commercial District by the July 1989 Zoning Ordinance of Plumstead Township. In the C-2 Highway Commercial District, a wide variety of commercial uses, including an automobile repair facility, are permitted.

The surrounding properties are highly developed with commercial and industrial establishments, including a tire store located south of the property; a concrete plant to the east; a medical facility north of the property; and automobile dealerships and banks located to the west across Route 611. The medical facility was constructed on totally filled wetlands after petitioners had purchased their property. Petitioners' property is the only undeveloped land in the immediate vicinity.

Of the 5.2 acres which comprise the property, approximately 3.94 acres are wetlands. There are only two upland areas, which are located in the southeast (front) and southwest (rear) corners. Together, these upland areas comprise approximately 1 1/4 acres. In 1979, Petitioners applied to the Pennsylvania Department of Environmental Resources ("DER") for a permit authorizing a retaining wall along the Pine Run Creek and approval to fill behind it to a height above the 100-year flood elevation. The project would have filled in all of the wetlands on the property. DER issued a letter accepting the calculations and methodologies but stating that permits would not be issued until land development was imminent.

In 1985, petitioners entered into an agreement of sale with Midas Realty Corporation to convey the property to Midas for $175,000, but the sale was contingent upon Midas' ability to secure all necessary permits and approvals for constructing and operating a Midas Muffler shop. On February 11, 1986, Midas filed an application with DER for a Water Obstruction Permit authorizing fill on a portion of the property to facilitate the construction of the proposed Midas Muffler shop and its attendant parking facilities. Submitted with the Midas application was a report containing calculations which showed that stormwater run-off and the 100-year floodplain elevations of the Pine Run Creek would not be increased by the project. The Midas project satisfied Plumstead Township's standards for stormwater management and floodplain use and the standards of the Bucks County Conservation District for erosion and sedimentation control. Because of opposition from DER and the U.S. Army Corps of Engineers to the filling of wetlands, however, Midas decided to discontinue its permit application, and DER never took any action with respect to that application.

After the Midas sale fell through, petitioners decided to pursue the development of the property themselves. They proposed to construct an automobile repair facility, a permitted use in the C-2 zoning district. They prepared a site plan utilizing basically the same design as the earlier project proposed by Midas.

On July 11, 1988, petitioners filed a permit application with DER and the Army Corps of Engineers, seeking authorization to fill .87 acres of wetlands. The fill was required to provide sufficient developable area adjacent to the upland frontage along Route 611 for construction of an automobile repair facility. The application proposed filling an area approximately 150 feet wide by 240 feet long, lying between the two upland areas on the property; construction of a 5,000-square-foot building and 37

parking spaces on the newly filled area; construction of a stormwater detention basin on the rear upland area; extension of a 36-inch reinforced concrete pipe; and installation of an outlet structure near Easton Road. In addition, in order to compensate for the wetland fill, petitioners proposed a .38-acre wetland creation area in the rear upland section.

In their proposal, petitioners considered whether a facility might be located in the rear upland corner; however, this alternative was simply not feasible. As set forth in their Comprehensive Environmental Analysis:

> The alternative of pushing the facility to the southeast corner of the tract where a larger portion of non-wetland area exists was considered and found less desirable to the present alternative for the following reasons: The area is currently steeply sloped and would also require substantial fill material in the wetland area. The access road would also have to be lengthened across the wetland area. The detention facility would still be required and would have to be constructed in the wetland area. In short, approximately equal amounts of disturbance to the wetland area would exist while moving the facility further back into the wildlife area (U.S. Army Corps of Engineers consideration) and further away from the patrons being served.

DER denied the permit application and the Mocks appealed to the Environmental Hearing Board ("EHB"). Hearings were held before Administrative Law Judge Robert D. Myers on July 9 and 10, 1991. The issues raised on the appeal were whether DER's denial of the permit application was proper, and, if it was,

whether the denial of the permit application effected a taking under the Fifth Amendment to the United States Constitution and article 1, section 10 of the Pennsylvania Constitution.

The EHB concluded that DER had properly denied the permit application. On the taking issue, after considering all of the testimony, the Board found: "The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 (the amount offered by Midas) or more."

The EHB accepted petitioners' proofs that construction on the rear upland area was not practical. In addition, the EHB found that the DER had not even challenged petitioners' proofs that no other permitted uses would have a lesser impact on the site's wetlands. Notwithstanding these findings of fact, the Board concluded that DER's action in denying the requested permit to fill .87 acres of wetlands did not effect a taking of all or of a portion of the property.

At odds with the EHB's conclusion is the unrebutted testimony of Russell Benner, petitioners' registered professional engineer, unchallenged by DER, that there were no other uses permitted by the zoning ordinance which would involve a lesser impact on the wetlands portion of the property than the proposed automobile repair facility. Rather, according to EHB, "common sense" suggested that some other permitted use involving less wetlands could be built on the site. The Board further speculated that any reduction in the size of the project which would reduce the amount of wetlands to be affected might induce DER to issue a permit, and thus ignored the testimony of DER representatives that any new permit application to fill wetlands on petitioners' property would have been futile. Richard Shannon, who reviewed the Mocks' application for DER testified:

Q. And isn't the location of the project off-site one of the factors that you believe has to be taken into account in terms of mitigation as it is defined in the regulatory sense?

A. Yes.

Q. Under what circumstances, then, in a non-water dependent project would you permit the intrusion upon wetlands?

A. Where there are no practicable alternatives to locating that project at that site.

Q. Do you mean where it's not practicable to locate it off-site in some other location?

A. Yes.

Q. So, in the case of Mr. Mock, I take it that you concluded that there is some off-site location at which an automobile facility can be located, for example, virtually any other place in the Doylestown area, correct?

A. Yes.

Q. And consequently, under no circumstances would you permit any filling of wetlands because one could mitigate by going somewhere else to a different site?

A. Essentially, yes. The Mocks never provided me any documentation indicating that this facility could not go at another site.

The EHB adjudication was issued prior to the decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

Petitioners filed a petition for review with the Commonwealth Court of Pennsylvania. In its majority opinion, the court considered *Lucas* and declined to apply its constitutional standard for determining whether the permit denial was a regulatory taking, despite finding substantial evidence to support the EHB's conclusion that the property was valueless in its present condition. The Commonwealth Court further saw fit to repair to "traditional" takings analysis, and opined that since the Mocks did not prove what their plans were on the purchase in 1963, the permit denial did not interfere with their investment backed expectations. Judge Kelley of the Commonwealth Court dissented and filed a separate opinion finding a taking under *Lucas*.

Petitioners then sought review by the Supreme Court of Pennsylvania. The appeal was allowed and oral argument was heard. On November 22, 1995 the Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court in a *per curiam* order.

REASONS FOR GRANTING THE WRIT

I.

THE PENNSYLVANIA COURTS HAVE DECLINED TO FOLLOW THIS COURT'S STANDARD FOR DETERMINING CATEGORICAL TAKINGS OF PROPERTY RENDERED VALUELESS BY THE DENIAL OF A WETLANDS FILL PERMIT, CONTRARY TO *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

As the Court stated in *Lucas v. South Carolina Coastal Council:* "When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." 505 U.S. at __, 112 S. Ct. at 2895, 120 L. Ed. 2d 798. It is well established that regulatory action is compensable without case-specific inquiry into the public interest advanced in support of the restraint when regulation on its face denies all economically beneficial or productive use of land. *See Agins v. Tiburon,* 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). However, the Commonwealth Court refused to apply this categorical analysis to petitioners' "as applied" takings challenge to DER's denial of a fill permit, even though the court found substantial evidence to support the EHB's finding that the property was presently valueless. The stated reason (pp. 16a-17a, *infra*):

> The state statute in *Lucas* prohibited all permanent development on the property in question, but the department's action with respect to the Mocks only denied the specific project under consideration. In this case, neither the Act nor the department's regulations prohibit the filling of wetlands,

> nor did the department's permit denial prohibit all construction on the Mocks' land.

Accordingly, the Pennsylvania courts below would not recognize a categorical taking in the absence of a facial and total statutory prohibition of economically viable use. This case presents the Court with the opportunity to clarify that categorical takings are not so restricted and may occur in the present context where a permit denial renders property valueless.

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit applied the categorical rule espoused in *Lucas* to find that a total taking was effected by the Army Corps of Engineers' denial of a permit to fill 12.5 acres of wetlands under section 404 of the Clean Water Act. The Federal Circuit succinctly characterized the law of regulatory takings after *Lucas* as follows:

> (a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
>
> (b) With regard to the interest alleged to be taken, there has been a regulatory taking if
>
> > (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> >
> > (2) the property owner had distinct investment-backed expectations; and

> (3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Id. at 1179. The Federal Circuit sustained the trial court's determination that there had been a denial of economically viable use of the land by comparing the value of the 12.5 acre parcel before and after the regulatory imposition, and the conclusion that the 99% diminution of value from $2,658,000 to $12,500 amounted to a total taking of the property owner's interests in the parcel. *See id.* at 1175, 1178. The Federal Circuit thus affirmed the judgment that Loveladies Harbor had suffered a regulatory taking of the 12.5-acre parcel.

In its adjudication of petitioners' takings claim, the EHB found that the property, without a permit to fill in a portion of the wetlands, was essentially valueless, and noted that with such a permit, the site could have a value of $175,000 — the amount offered by Midas — or greater. But contrary to the Federal Circuit's opinion in *Loveladies Harbor,* the Pennsylvania courts made a radical retreat from *Lucas* and held that this was not enough for a categorical taking.

Following *Lucas,* the EHB's finding that the property was rendered valueless categorically entitled petitioners to compensation, unless the proscribed use interests were not part of their title to begin with, 505 U.S. at __, 112 S. Ct. at 2899, 120 L. Ed. 2d 798; that is, if DER could "identify background principles of nuisance and property law that prohibit the uses" intended "in the circumstances in which the property is presently found." *Id.* at __, 112 S. Ct. at 2901-02, 120 L. Ed. 2d 798. Indeed, the Pennsylvania courts did not consider this final point, because they short-circuited the takings analysis by ignoring the

determination that the absence of a fill permit left the property essentially valueless.

II.

PENNSYLVANIA HAS SOUGHT TO AVOID THIS COURT'S CATEGORICAL TAKINGS RULE BY IMPOSING ON THE PROPERTY OWNER AN UNCERTAIN AND POTENTIALLY INTERMINABLE BURDEN OF EXCLUDING ALL ECONOMICALLY VIABLE USE IN THE PERMIT APPLICATION PROCESS.

According to the majority opinion of the Commonwealth Court, petitioners could not succeed on their taking claim unless and until they exhausted any number of alternative proposals for construction on the property, even though DER acknowledged that no alternative plan would be acceptable to it, let alone restore economic value to the property.

Initially, DER suggested that the Mocks could develop the site as a wetlands nursery, but of course could not show that this would have any economic value. The DER also suggested that the Mocks should develop only the uplands at the rear corner of the parcel, most distant from the Easton Road frontage. Access to the highway could be obtained via a road on adjoining property, but that adjoining property owner refused permission. Or, according to DER, petitioners could build a bridge over the wetlands. Rejecting DER's approach, the EHB expressly accepted petitioners' unrebutted showing that development of the rear uplands area was not practical.

The Commonwealth Court further speculated that DER's denial of a permit for the proposed auto repair facility did not foreclose some other development of the property which may not require filling of wetlands in the same amount or location. The

Commonwealth Court expected the property owners to bear the burden of establishing "the impossibility" of using the property for any number of uses in the C-2 Highway Commercial District: museums, libraries. hospitals, nursing homes, medical and other office buildings, recreational and municipal facilities, service and retail shops, and restaurants.

Notwithstanding the unfairness inherent in requiring the property owner to prove the negative in a potentially interminable series of permit applications before a taking might arise, the exercise would prove nothing further in this case because DER had made it clear that no intrusion on wetlands of any kind would be permitted as long as the project — whatever it was — could be located virtually any other place in the Doylestown area. As it was, petitioners' proposal for a 5,000 square foot building and 37 parking spaces was quite modest for the 5.2 acre tract (with .38 acres to be dedicated as wetland replacement). Any application for a smaller project design would have been futile because the DER would require it to be located at some other site in the area. Moreover, as found by the EHB, DER left unchallenged petitioners' proofs that no other permitted use would have a lesser wetland impact.

Attempting to explain away the EHB's factual conclusions, the Commonwealth Court held (p. 17a, *infra*):

> The import of the Board's finding that the land in its current state is valueless, is simply that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

In the absence of a common law nuisance, the true legal import of the Board's finding that the land is presently valueless is that there has been a regulatory taking, and that petitioners are entitled to a monetary recovery for the value of the land.

III.

IN THE CONSTITUTIONAL DETERMINATION OF ECONOMICALLY VIABLE USE, THE BURDEN OF PRODUCTION MUST BE SHIFTED TO THE GOVERNMENT ONCE THE LANDOWNERS HAVE SUBMITTED UNREBUTTED EVIDENCE THAT THEIR PROPERTY IS VALUELESS.

Loveladies Harbor rejected the government's contention that the property owners had to apply for a permit to fill a lesser area before they could demonstrate that there are no remaining economically viable uses. As in the present case, the property owners established that further applications would have been futile, and the owners were entitled to a presumption that there were no economically viable uses, and that the burden is on the government to prove otherwise. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 157-58 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). The EHB relied on its "common sense" that the Mocks could have submitted some proposal with a lesser impact. As recognized in *Loveladies Harbor*: "Common sense, however, indicates the impossibility of requiring the plaintiff to prove a negative." *Id.* at 157.

At the EHB hearing, petitioners presented sufficient evidence to be entitled to judgment as a matter of law; the EHB in fact decided that the land in its current state has been rendered valueless. Thence, the burden of production should shift to the government. *Id.* at 158; C. McCormick, *McCormick on Evidence*

§ 338 (3d ed. 1984). DER offered no proof of any alternative uses and instead relied on its misperception that the property owners bore the entire burden of proof and persuasion.

In regulatory takings cases, once the plaintiff presents sufficient and unrebutted evidence so as to be entitled to judgment as a matter of law that they have been deprived of all economically viable use of the property, the burden of presenting sufficient evidence to the contrary must pass to the government. Furthermore, the government must then demonstrate practicable and reasonably probable uses, and the finder of fact must discount any proposed uses that do not meet a "showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a demand for such use in the reasonably near future." *Loveladies Harbor*, 21 Cl. Ct. at 158 (quoting *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980), *cert. denied sub nom. Bassett v. United States*, 451 U.S. 938, 101 S. Ct. 2017, 68 L. Ed. 2d 324 (1981)); *see Olson v. United States*, 292 U.S. 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934). If the government does not meet the *Olson* standard of reasonable probability for adaptability and demand in the market, the regulatory intrusion will have rendered the parcel without economically viable use.

The opinion of the Claims Court in *Loveladies Harbor* foreshadowed Justice Scalia's observation in *Lucas* that the takings analysis "presumes the unconstitutionality of state land-use regulations only in the sense that any rule-with-exceptions presumes the invalidity of a law that violates it — for example, the rule generally prohibiting content based restrictions on speech." 505 U.S. at __ n.6, 112 S. Ct. at 2893 n.6, 120 L. Ed. 2d 798. The government cannot constitutionally escape a finding that a taking has occurred for all practical purposes by leaving the property owner with an interminable burden of pursuing applications for smaller projects. In the wetlands context, once

the property owner proves that a denial of an otherwise lawful project has rendered a property valueless, it is incumbent on the government to show that there are reasonably probable alternative uses to establish that the property retains economic use, much as the Court has required the government to bear the burden of showing rough proportionality between a permit condition and the impact of the owner's proposed development in order to avoid takings liability. *Dolan v. City of Tigard*, __U.S.__, 114 S. Ct. 2309, 2319-20, 129 L. Ed. 2d 304 (1994). Burden shifting is necessary if the Fifth Amendment guarantee is to have meaning.

The effect of the opinions below is to deny a regulatory takings claim unless and until the property owner forecloses all alternative uses in any number of reapplications, even though the uncontroverted evidence admits only of the conclusion that no other project would be acceptable.

IV.

THE PENNSYLVANIA COURTS HAVE SKEWED THE TAKINGS ANALYSIS TO DENY JUST COMPENSATION BY CONFUSING THE SUBSTANTIVE DETERMINATION OF ECONOMICALLY VIABLE USE WITH THE RIPENESS REQUIREMENT.

Whether the property owner is required to submit alternative applications containing less ambitious proposals in a given case is a factor in determining not whether the property owner has been deprived of all economically beneficial use, but rather whether the taking claim is sufficiently ripe for litigation in the first instance. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9, 106 S. Ct. 2561, 2569 n.9, 91 L. Ed. 2d 285 (1986).

In reaching the merits, the Pennsylvania courts were satisfied that petitioners had made a sufficiently meaningful application for the fill permit, and there was no question that the takings claim was ripe for adjudication. However, they strained to conclude that petitioners did not rule out any and all productive use through further applications to reject the takings claim on the merits. Whether the property owner has pursued permissible uses to the point of ripeness must be extricated from the substantive takings analysis. The effect of the rulings below is to condemn the property owner not only to piecemeal litigation or otherwise unfair procedures in order to pinpoint just what use may be made of the affected property, which is precisely what Justice Stevens warned against in *MacDonald*, 477 U.S. at 350 & n.7, 106 S. Ct. at 2567 & n.7, 91 L. Ed. 2d 285, but also to an adverse final determination on the merits of the takings claim.

The open-ended exhaustion of uses mandated by the Pennsylvania courts also negates the futility exception recognized in the ripeness cases: on grounds of futility, a party might even bypass a permit process and go directly to court seeking judicial review of a law's constitutionality under the takings clause. For example, the permit application may not be a "viable option," *Herrington v. County of Sonoma*, 857 F.2d 567, 570 & n.2 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090, 109 S. Ct. 1557, 103 L. Ed. 2d 860 (1989), or the granting authority may have dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming, *e.g.*, *Parkview Corp. v. Department of Army*, 490 F. Supp. 1278, 1282 (E.D. Wis. 1980). It is quite a strange turn to adjudicate a regulatory takings claim on the premise that the requisite finality in the permit application process has been achieved, only to reject the claim because the property owners' efforts in seeking every last permissible use are inevitably found wanting.

The Court has acknowledged that there is no precise formula for determining whether a landowner has been deprived of economically viable use of his property. Instead, the reviewing court must make "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224, 106 S. Ct. 1018, 1026, 89 L. Ed. 2d 166 (1986). The decisions of the courts below render it virtually impossible to prove a categorical regulatory taking from the denial of economically viable use of property and thereby unconstitutionally block the path to just compensation. They take the property owners' threshold requirement of obtaining from the regulating agency a "final definitive position regarding how it will apply the regulations at issue to the particular land in question," *MacDonald*, 477 U.S. at 351, 106 S. Ct. at 2568, 91 L. Ed. 2d 285, and use it as a pretext to foreclose the petitioners' takings claim on the merits. The government's similar attempts in *Loveladies Harbor*, 21 Cl. Ct. at 157-59, and *Formanek v. United States*, 26 Cl. Ct. 332 (1992) were roundly rejected. The Federal Circuit requires that the determination whether the government has taken all economically beneficial use of land be guided by its market value, if any, after the permit denial. *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1565-67 (Fed. Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995). Pennsylvania, on the other hand, insists that the property owner exhaust all manner of impossibilities. The present case begs loudly for clear guidance in resolving "the economic impact of the regulation on the claimant." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

V.

THE STATE AND FEDERAL COURTS REQUIRE CLARIFICATION WHETHER INVESTMENT-BACKED EXPECTATIONS REMAIN AS A FACTOR TO BE CONSIDERED OR ARE SUBSUMED IN A FINDING OF A CATEGORICAL TAKING.

It is somewhat unclear after *Lucas* whether the claimant's investment-backed expectations must be considered in cases of categorical takings. The Federal Circuit appeared to retain this factor as part of the takings analysis in *Loveladies Harbor,* but stated in *Florida Rock* that in such cases, *Lucas* teaches that the economic impact factor alone is determinative and no balancing of factors is required. *Florida Rock,* 18 F.3d at 1564.

Under the rubric of "traditional takings analysis" the Commonwealth Court determined that the permit denial did not interfere with investment-backed expectations because the owners did not prove what their plans were in 1963 when they purchased vacant land on a major highway. In doing so the court below nullified the legitimate expectations of the owners and utterly ignored that the restriction foreclosed development of commercially zoned property long held for investment purposes. If the Mocks' investment-backed expectations remain a factor to be considered in a categorical takings case, they are entirely consistent with the conclusion that their property has been taken by virtue of the wetlands regulation. The Commonwealth Court's rationale, which assumes that people purchase property with no thought of being rewarded, nullifies well established concepts of reasonable investment-backed expectations.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If petitioners are correct in urging that the denial of their permit application has effected a total, categorical taking, the matter should be remanded to the Pennsylvania Environmental Hearing Board for determination of just compensation for the taking.

Respectfully submitted,

KEVIN J. COAKLEY
Counsel of Record
ERNEST W. SCHOELLKOPFF
CONNELL, FOLEY & GEISER
Attorneys for Petitioners
85 Livingston Avenue
Roseland, New Jersey 07068
(201) 535-0500

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, NOVEMBER 22, 1995

(J-171 of 1995)
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 110 E.D. Appeal Dkt. 1994

Appeal from Order of Commonwealth Court entered March 25, 1993, at No. 1153 C.D. 1992, Affirming Decision of Pennsylvania Environmental Hearing Board entered May 1, 1992, at No. 90-166-MR

Argued: October 24, 1995

MR. AND MRS. CONRAD MOCK,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER

PER CURIAM: DECIDED: November 22, 1995

Order affirmed.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Pa.R.J.A. 701(f).

Judgment entered

Appendix A

s/ John W. Person
John W. Person, Esquire
Deputy Prothonotary

APPENDIX B — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA, MARCH 25, 1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1153 C.D. 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

ORDER

NOW, March 25, 1993, the decision of the Pennsylvania Environmental Hearing Board, dated May 1, 1992, at EHB Docket No. 90-166-MR, is affirmed.

s/ David W. Craig
DAVID W. CRAIG, President Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
MAR 25 1993
s/ CR Hostutter
Deputy Prothonotary — Chief Clerk

APPENDIX C — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 25, 1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1153 C.D. 1992

ARGUED: NOVEMBER 18, 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge

OPINION BY PRESIDENT JUDGE CRAIG

FILED: March 25, 1993

Appendix C

Conrad and Barbara Mock appeal from a decision of the Pennsylvania Environmental Hearing Board, which upheld the Department of Environmental Resources' denial of the Mocks' permit to fill wetlands on their property to construct an auto repair shop, and also ruled that the department's denial did not effect an unconstitutional taking of the Mocks' property.

The Mocks do not challenge the board's determination that the department correctly denied the permit application under the applicable statutes and regulations. Therefore, the sole question for our review is whether the department's permit denial accomplished a taking, under the U.S. and Pennsylvania Constitutions, for which the Mocks must be compensated.

Because the circumstances of this case do not fall within the newly articulated categorical rule in *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992), nor do they qualify as a taking under traditional takings analysis, we hold that the board did not err in deciding that the Mocks did not suffer a unconstitutional taking when the department denied their permit application.

BACKGROUND

The relevant facts from the record are as follows. The Mocks are part-owners of a 5.2 acre tract of land in Bucks County, Pennsylvania, which they bought in 1963. The western edge of the parcel fronts along a busy road in a "C-2 Highway Commercial District" as designated by the local zoning ordinance.[1] Auto repair shops are a permitted use in the Highway

---

1. Zoning Ordinance of the Township of Plumstead, July 1989, (Ordinance).

Commercial District, under section 1401a of the Ordinance. All of the parcels surrounding the Mocks' site have been developed, but the Mocks have not subdivided or developed their land since they bought it in 1963.

Of the 5.2 acres on the site, 3.94 acres are wetlands, as defined by the department's regulations at 25 Pa. Code §105.1.[2] The Mocks do not dispute the definition or delineation of the wetland areas on their property. The approximately 1 1/4 acres of non-wetlands, known as upland areas, are located in the southwest and southeast corners of the parcel, are rather steeply sloped in places, and are separated by approximately 100 feet of wetlands. A stream, Pine Run Creek, runs roughly along the northern boundary of the property.

In 1988 the Mocks applied to the department for a permit[3] to fill .87 acres of wetlands on their property, to enable them to build their proposed auto repair shop and its associated driveways and parking spaces. The department regulates activities which may affect wetlands under the provisions of the Dam Safety and Encroachments Act, (Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§693-1 - 693.27, and according to the regulations implementing the Act in 25 Pa. Code §§105.1 -105.451.

---

2. Wetlands are defined as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas." 25 Pa. Code §105.1.

3. The Mocks submitted a Joint Permit Application to the department, one copy of which was forwarded to the U.S. Army Corps of Engineers for their evaluation of the project. However, only the department's permit denial is at issue here.

Appendix C

The department conducted a preliminary review of the Mocks' application and concluded that the project, as proposed, presented potentially significant adverse environmental impacts under the criteria listed in 25 Pa. Code §105.14(b). In a letter to the Mocks dated September 23, 1988, the department specified that the proposed project had an impact on the wetland ecology, and that the auto repair shop did not need to be built close to water, two relevant concerns under 25 Pa. Code §§105.14(b)(4) and (b)(7).

In that letter, the department also requested that the Mocks submit additional information about alternatives to the project which could reduce the adverse environmental impacts, additional information about the need for the project and its resulting public benefits, and its effect on the natural condition of the wetlands involved. The department identified these issues as necessary considerations pursuant to 25 Pa. Code §§105.15 and 105.16. As part of the preliminary review, the department also considered the recommendations of other agencies involved in granting a permit to fill wetlands, in particular, the Pennsylvania Fish Commission, the Environmental Protection Agency, and the U.S. Fish and Wildlife Service. The record reveals that all of these agencies recommended denial of the Mocks' project as proposed.

The Mocks, through their engineering consultant Russell Benner, responded to the department's preliminary review in a letter dated September 30, 1988, in which he suggested moving the location of the building, offered to maintain a buffer between the project and the wetlands through a conservation easement and by planting trees, and noted that the Mocks' plan provided for a wetland replacement area of .38 acres to compensate for the proposed filling of .87 acres. Mr. Benner also noted that he

considered the application complete at that time, and that all matters had been adequately discussed. His letter to the department stated, "[w]e will not accept the permit application being deemed incomplete in lieu of taking action on the permit request, therefore we hope that future correspondence from your office will address a conditional approval of, or a denial of the permit application."

In October 1988 the department contacted Mr. Benner to suggest that the Mocks consider limiting their construction to the uplands portion of their property. Mr. Benner responded that this proposal would require the Mocks to secure a variance from the township's setback requirements,[4] and that he would pursue that alternative. The Mocks did not submit any alternative proposals to the department.

Thereafter, the department completed its review of the Mocks' application. In a letter dated April 12, 1990, the department notified the Mocks that their application was denied. The reasons for the denial were similar to the ones the department gave in its preliminary review, namely, that the project adversely affected wetlands and wetland ecology, that the Mocks did not demonstrate that alternatives with less impact on wetlands did not exist to attain the goals of the project, and that the public benefits of the project did not outweigh the environmental harms.

The Mocks appealed the denial to the Environmental Hearing Board, arguing that the department erred in denying their permit, and that the department's action constituted a taking

---

4. Section 1402b of the Ordinance specifies the minimum setback requirements for permitted uses in the C-2 District.

of their property. Before the board ruled, the department and the Mocks met to discuss possibilities for settlement. In the course of that meeting the department again suggested that the Mocks consider using only the upland portions of the property for their shop, but the Mocks rejected that idea as economically infeasible. The department also suggested using the property for a wetlands nursery, but the Mocks rejected that idea as well.

After two days of hearings, in which it took additional evidence, the board upheld the department's denial in a decision issued on May 1, 1992. After concluding that it had jurisdiction over the Mocks' appeal, the board ruled that the department correctly denied the project permit and that the denial did not constitute a taking. From the board's ruling that the department's action did not effect an unconstitutional taking, the Mocks appeal to this court.

THE ENVIRONMENTAL HEARING BOARD'S DECISION

The board's decision consisted of extensive findings of fact, discussion, and conclusions of law. Some of the facts were stipulated by the parties, describing the parcel, the project, and an earlier unsuccessful attempt by the Midas Realty Corporation to secure permission to fill wetlands on the Mocks' property to build a muffler repair shop.[5]

---

5. In 1985 the Mocks entered into an Agreement of Sale with Midas Realty Corporation for $175,000, which was contingent upon Midas' ability to secure all the permits necessary to build a muffler repair shop on the property. When Midas encountered opposition to the project from the department and the Army Corps of Engineers in 1986, it abandoned the project. The design of the Mocks' project was "basically the same as the design of the Midas project." Finding of Fact No. 25.

Appendix C

Based on the amount quoted in the Midas deal, Finding of Fact No. 54, which is important to deciding the takings question, states, "[t]he Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants [the Mocks], the Site could have a value of $175,000 (the amount offered by Midas) or more. . . ."

The board's discussion outlined the review procedures that the department followed in evaluating the Mocks' project.[6] As already stated, of the ten factors to be considered in evaluating projects which interfere with wetlands, the department found two to be relevant — the impact of the proposed project on the ecology of the wetlands, and the extent to which the project was water-dependent. 25 Pa. Code §§105.15(b)(4) and (b)(7). Because the department found that the project had the potential for significant environmental harm, the department then proceeded to consult with the Mocks to examine ways to reduce or eliminate the harm, pursuant to 25 Pa. Code §105.16(a), including ways to mitigate the harm.

The department defines mitigation in 25 Pa. Code §105.1 as follows:

> An action undertaken to accomplish one or more of the following purposes:
>
> (i) Minimize impacts by limiting the degree

---

6. The board noted, and we note also, that Chapter 105 of 25 Pa. Code was substantially revised effective October 12, 1991. The references in the board's decision, and in ours, are to the version of the regulations in effect on April 12, 1990, when the department denied the Mocks' permit.

Appendix C

or magnitude of the action and its implementation.

(ii) Rectify the impact by repairing, rehabilitating or restoring the impacted environment.

(iii) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.

(iv) If the results listed in subparagraphs (i) - (iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

In this case the department considered the Mocks' efforts to mitigate the environmental harm and concluded that, although they attempted to reduce the negative impact over time by proposing deed restrictions and a tree buffer under factor (iii), the Mocks did not adequately avoid or minimize the negative impact by considering reducing the size of the project or changing its proposed use, under factor (i). The department did not find factor (ii) applicable to the Mocks' proposal.

Further, the department continued its analysis of the Mocks' proposal to include replacement wetlands as a part of their project, according to factor (iv). The department concluded, and the board agreed, that the Mocks' creation of .38 acres of replacement wetlands did not compensate for the environmental harm caused by the loss of .87 acres of wetlands, as proposed.

The department then proceeded to the third step in its evaluation, as required by 25 Pa. Code §105.16, to weigh the public benefits against the environmental harm of the project. Of the possible benefits listed in that section of the regulations, the Mocks identified five positive effects of their project: reduction of illegal trash dumping from the roadway; elimination of erosion and sediment pollution; reduction of air pollution resulting from auto repairs; the creation of 20-30 jobs; and fulfilling a need for general auto repairs in the area.

The department ruled, and the board agreed, that the Mocks did not prove that the benefits outweighed the harms. The reduction of trash and erosion could be accomplished with minor measures if they were proven to be problematic. The other three benefits — reducing air pollution, creating jobs, and satisfying demand — were all associated with the shop itself, but were not shown to be tied in any way to the shop's location on the Mocks' land, near or on wetlands. The Mocks do not question the department's balancing of harms and benefits here on appeal.

After determining that it had jurisdiction,[7] the board concluded that the Mocks did not suffer an unconstitutional taking because the Mocks did not prove that their land was valueless after the department's permit denial. Relying on *Andrus v. Allard*, 444 U.S. 51 (1979), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), among others, the board ruled that although the department's action may prevent the Mocks from the most profitable use of their property, reduction in value is not enough to find a taking.

---

7. The department had argued that the board lacked jurisdiction to consider the takings question, but revised its position on appeal to this court, stating that the board correctly determined that it had jurisdiction.

Appendix C

Based on the fact that the Mocks did not consider any alternative projects or submit revised applications to the department, the board stated, "[s]ince Appellants [the Mocks] did not seek approval for a smaller facility, we cannot conclude that they will be denied any use of the wetlands." Further, the board stated that, "[c]ommon sense tells us that some of the other permitted uses do not require a 5,000 square foot building and may not require as many parking spaces."

The board was persuaded that the Mocks' investment-backed expectations were not destroyed, because they never introduced evidence of what their expectations were when they purchased the property in 1963 or afterwards, and because riparian land has been "the subject of regulation for centuries," citing *White v. Pennsylvania Railroad Co.*, 354 Pa. 397, 47 A.2d 200 (1946). The board perceived no evidence to suggest that, just because the department denied the fill permit for this particular project, it would prohibit all projects which required any filling of wetlands; thus, in the board's view, the Mocks' investment-backed expectations were not destroyed.

Within the legal framework of traditional takings analysis, the board concluded that the department's action was not an unconstitutional taking of the Mocks' property. After the board rendered its decision, the U.S. Supreme Court decided the Lucas case, on which the Mocks rely heavily to support their argument that because the department's action left their property valueless, the board erred in not finding a taking.

Our scope of review in Environmental Hearing Board decisions is to determine whether the record contains substantial evidence to support the board's findings of fact, and whether the board committed errors of law or constitutional violations.

Appendix C

Willowbrook Mining Co. v. Department of Environmental Resources, 92 Pa. Commonwealth Ct. 163, 499 A.2d 2 (1985).

THE LUCAS DECISION

In *Lucas*, decided on June 29, 1992, the U.S. Supreme Court considered the appeal of an owner of beachfront property in South Carolina, who was prohibited from developing any permanent habitable structures on his land by the 1988 South Carolina Beachfront Management Act, enacted after Mr. Lucas had purchased the property. S.C. Code §§48-39-250-290 (Supp. 1990). The Beachfront Management Act directed the South Carolina Coastal Council to establish a baseline beyond which construction of habitable improvements was prohibited, for the purpose of preserving the state's beaches. No exceptions were provided in the Beachfront Management Act.[8]

After first deciding that the claim was ripe, Justice Scalia outlined the two categories of regulatory actions which would be compensable without the "case-specific inquiry into the public interest advanced in support of the restraint" that would normally be required in a traditional takings analysis. Lucas, __ U.S. at __, 112 S.Ct. at 2893. The first type involves regulations which compel a property owner to allow a physical invasion of his property. *Id.* at __, 112 S.Ct. at 2893. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Id.* at __, 112 S.Ct. at 2893.

---

8. S.C. Code §§48-39-280(A) and 290(A) (Supp. 1988). In the course of Mr. Lucas' appeal, the South Carolina legislature amended the Beachfront Management Act to allow the Council to issue special construction permits in certain circumstances. S.C. Code §48-39-290(P)(1) (Supp. 1991).

Appendix C

Justice Scalia distinguished between government regulation that diminishes property values and the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted. . . ." *Id.* at __, 112 S.Ct. at 2894 (emphasis in original). He stated:

> And the *functional* basis for permitting the government, by regulation, to affect property values without compensation — that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . — does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

Id. at __, 112 S.Ct. at 2984 (emphasis in original and citations omitted) (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922)).

Justice Scalia would require compensation in situations where "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . ," *Id.* at __, 112 S.Ct. at 2895 (emphasis in original), typically, as in Mr. Lucas' case, requiring land to be left in its natural state. The Court accepted the trial court's finding that Mr. Lucas' land was rendered valueless by the South Carolina law, fitting this case into the second category of takings cases described by Justice Scalia.

The Court in *Lucas* then defined circumstances where the government could avoid compensating a land owner in a

categorical taking, even where the land was deprived of all value, if the regulation in question does no more than could be accomplished under the state's nuisance laws. "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere . . . in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at __, 112 S.Ct. at 2900. Because the question of whether Mr. Lucas could have been prohibited from developing his land under existing nuisance law was not addressed below, the Supreme Court remanded the case to the South Carolina Supreme Court for consideration of that issue.

The Mocks argue that *Lucas* applies to their situation, and that the board's own findings support the conclusion that the department's action constituted a taking. First, they note that the board found that their property, in its present condition and without a permit, is essentially valueless. Finding of Fact No. 54. Second, they argue that each of the alternatives suggested by the department, namely, using the site as a wetlands nursery, and confining development to the upland areas, were economically infeasible, and the board recognized them as unreasonable options. Third, the Mocks argue that the department never substantiated that it would grant a permit to fill any portion of the wetlands. We will address their arguments in turn.

Although we find substantial evidence to support the board's finding that the Mocks' property is valueless in its present condition, that finding does not put the Mocks in the same situation as the land owner in *Lucas*. The state statute in *Lucas* prohibited all permanent development on the property in question, but the department's action with respect to the Mocks only denied the specific project under consideration. In this case,

neither the Act nor the department's regulations prohibit the filling of wetlands, nor did the department's permit denial prohibit all construction on the Mocks' land.

The import of the board's finding, that the land in its current state is valueless, is simply to state that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

In its discussion, the board accepted as reasonable the Mocks' rejection of the department's suggestion to build their shop in the southeast uplands corner of the lot, because it was objectionable from a business standpoint. According to the Mocks, if the shop was located in that corner of the lot, it would have low visibility from the highway, would be close to noise and dust from a neighboring cement plant, and would require construction of a bridge or access road to reach it, which would also require filling of wetlands.[9]

We agree with the board's determination that the proposed alternative location for the garage may be unreasonable from a business standpoint, but, again, the department's denial of this project does not foreclose other uses of the property. As the board points out, there are a variety of uses permitted in this C-2 Highway Commercial District, which may not require filling of wetlands in the same amount or location as the plan submitted by the Mocks. Section 1401a of the Ordinance permits a variety of uses in the C-2 district, including museums, libraries, hospitals,

---

9. The wetland nursery option was never fully explored by the department or the board, because it "did not make sense" to the Mocks. Finding of Fact No. 49.

nursing homes, medical and other office buildings, recreational and municipal facilities, service and retail shops, and restaurants. The Mocks have not established the impossibility of using the property for service or retail shops, for example.

The Mocks next argue that the department never guaranteed that it would approve a permit to fill wetlands for an access road to reach the garage if it was moved to the uplands corner, or for any other purpose, but the record does not support this contention. Because the Mocks never submitted alternative proposals to the department, the department could only respond to questions about hypothetical situations. However, when questioned about the possibility of granting a permit to fill wetlands for an access road to reach the southeast uplands corner, Richard Shannon, a water pollution biologist for the department, testified, "I feel that a driveway construction on this property would be feasible because the impact would be minimal."

The board correctly states that the department's "action was to deny permission for Appellants [the Mocks] to proceed with a specific project design. It does not go beyond that point." Although the board did not consider *Lucas* in its evaluation, the facts and conclusions the board did make in upholding the department's action support our interpretation that the Mocks' case is distinguishable from *Lucas*. Because we find *Lucas* to be inapplicable to this case, we need not consider whether the Mocks' project would have already been prohibited under existing nuisance or property law.

TRADITIONAL TAKINGS ANALYSIS

Although we have determined that the Mocks' case is not the

extraordinary one when no economically beneficial use of land is permitted, *Lucas*, __ U.S. at __, 112 S.Ct. at 2894, we must still evaluate their situation under the principles of takings analysis established by previous court decisions. Both the Fifth Amendment to the U.S. Constitution, and Article I, section 10 of the Pennsylvania Constitution provide that private property shall not be taken for public use without just compensation.[10]

The Act and the department's regulations are exercises of the state's police power, to enact and enforce laws for the promotion of the public welfare. *Willowbrook Mining Co.*, 92 Pa. Commonwealth Ct. at 169, 499 A.2d at 5. In *Lawton v. Steele*, 152 U.S. 133 (1894), the U.S. Supreme Court provided a three-part test for the validity of a state's actions under its police power: (1) The public interest must require such interference; (2) The means chosen must be reasonably necessary for the accomplishment of the purpose; and (3) The means chosen must not be unduly oppressive on individuals. *Id.* at 137.

As the board noted in its decision, the Mocks concede that the department's action satisfies the first two prongs of *Lawton*. The Mocks never argued that the purpose of the Act was invalid, or that the Act and its implementing regulations were not tailored to meet a legitimate state purpose.[11] The Mocks argue that the

---

10. U.S. Const. amend. V, and Pa. Const. art. I, §10. Because the courts of our commonwealth have interpreted the takings clause using the same framework as the federal courts, we need not pursue two separate levels of analysis here.

11. Section 693.2 of the Act, 32 P.S. §693.2, states the purposes of the Act, which are to regulate and plan dams and other water encroachments in order to protect the health, safety, and welfare of people and property, to protect the state's natural resources, and to protect navigation.

permit denial places an undue burden on them as individual property owners, according to the third prong of *Lawton*. Our court recognized that "an unconstitutional taking of private property would be unduly oppressive." *Willowbrook Mining Co.*, 92 Pa. Commonwealth Ct. at 170, 499 A.2d at 5.

Before the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the concept of a taking was generally limited to a direct physical appropriation of private property or the functional equivalent of such an ouster. *Lucas*, __ U.S. at __, 112 S.Ct. at 2892. In *Mahon*, Justice Holmes recognized the potential for a taking to occur through the operation of government regulation. He stated, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415.

Since that time, the United States Supreme Court has not decided the point at which a regulation goes too far according to any set formula, but has been guided by the facts and circumstances in each case. *Penn Central Transportation Co.*, 438 U.S. at 124. In general, compensation for a government taking will be required when "the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992).

In its case-by-case, factual inquiries, the Supreme Court has identified several important factors in determining whether a regulatory taking has occurred: the type of governmental interference; the diminution of property values; and the extent to which the regulation interferes with reasonable, distinct,

investment-backed expectations. *Penn Central Transportation Co.*, 438 U.S. at 124 . We will analyze each of these factors as it relates to the Mocks' circumstances.

First, the courts have been more likely to find a taking if a regulation compels a property owner to allow a physical invasion of his property, rather than interference with its use. *Id.* at 124. Even a minimal permanent intrusion on private property has been considered a taking, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court found a regulatory taking when property owners were required to allow cable television equipment to be attached to their buildings. Because the regulation in the Mocks' case does not involve a physical interference with property, this factor does not persuade us to conclude that a taking has occurred.

When a regulation interferes with the use of property, its effect on property values is an important consideration in our analysis. Because government would cease to function if the state was compelled to compensate property owners every time a regulation diminished property value, the courts have uniformly held that diminution in property value, standing alone, cannot establish a taking; the takings issue must be resolved by focusing on the uses that the regulations permit. *Penn Central Transportation Co.*, 438 U.S. at 131.[12]

Further, a regulation does not effect a taking just because it deprives a property owner of the most valuable use of his property. *Andrus*, 444 U.S. 51.[13] Where an owner possesses a

---

12. *See also Euclid v. Ambler Realty Co.*, 272 U.S- 365 (1926), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

13. *See also Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

"full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking" because the effect of the regulation must be viewed in its entirety. *Andrus*, 444 U.S. at 66. In applying these principles, the Supreme Court has sustained regulations that have resulted in large reductions in property value where the land retains significant value. *Pace Resources. Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (citing *e.g.*, *Euclid* and *Hadacheck*).

The Mocks did not present any evidence of the diminution in their property value, except to quote the amount involved in their earlier sales agreement with Midas to build a muffler shop, which fell through, and to submit a narrative appraisal report which supported that estimate. Because the Mocks focused on only two options for their land, building an auto repair shop according to their specific site plan or leaving the land undeveloped, they did not offer any testimony or evidence about the economic value of their land which could be realized through other development options.

Therefore, although we accept the board's finding that the land in its present state is essentially valueless, the Mocks failed to prove that their land lost all of its residual value when the department denied their fill permit. The Act does not compel the Mocks to leave their land in its present undeveloped state, and we must focus on the remaining uses which the regulations permit. Because there is no evidence in the record that the land cannot be put to economically viable use, this factor also weighs against finding a taking.

The third factor in our analysis involves the effect of the department's action on the Mocks' reasonable, distinct,

investment-backed expectations for their property. As stated in *Pace Resources. Inc.*, "[t]he concept of reasonable, distinct, investment-backed expectations may . . . involve a recognition of the fact that a property can have value, arising from partially executed plans for development, that is unique to its owner and not reflected in its current market value." 808 F.2d at 1032-33. However, the expectations are reasonable only if they take into account the power of the state to regulate property for the public interest, and, for a taking to occur, the regulation must have almost the same effect as the destruction of the owner's property rights. *Id.* at 1033.

We find substantial support for the board's finding that the Mocks never presented any evidence of what their plans were for their property when they bought it in 1963. The department's permit denial did not interfere with any present or past use of the property, so we must focus on what the Mocks could reasonably expect to do with their property in the future. *See Penn Central Transportation Co.*, 438 U.S. at 136.

As to the Mocks' future plans, we further agree with the board that the Mocks could not reasonably expect to develop their land free from government regulation because it is riparian land, which has been subject to regulation for centuries. *White v. Pennsylvania Railway Co.*. Not only is a large part of their parcel wetlands, which the Mocks do not contest, but it is also within the 100-year floodplain, as designated by the local zoning ordinance.

The department's action prevents the Mocks from proceeding with the development of their auto repair shop as planned, but it does not destroy the Mocks' rights to develop their property according to some alternative plan, even if that plan

involves some filling of wetlands. Thus, the Mocks' reasonable investment-backed expectations were not frustrated to the point of effecting a taking of their property.

The Mocks rely on two decisions of the U.S. Claims Court to support their takings argument, *Loveladies Harbor, Inc. v. The United States*, 21 Cl. Ct. 153 (1990), and *Formanek v. The United States*, 26 Cl. Ct. 332 (1992), but we are not bound or persuaded by these decisions. In each of these cases the landowners appealed from the Army Corps of Engineers' denial of a permit to fill wetlands, and in each instance the U.S. Claims Court found that a taking had occurred.

In *Loveladies Harbor, Inc.* the court determined that a taking occurred because of the significant diminution in property value, based on a comparison of the estimated fair market value of the land if it was fully developed for its most profitable use, to the value of the land sitting idle, which was almost zero. The court was not persuaded that the alternative uses suggested by the government had a "reasonable probability" of being successfully developed. *Loveladies Harbor, Inc.*, 21 Cl. Ct. at 159. Furthermore, the court found that the federal and state regulations in question lacked a substantial, legitimate state purpose. *Id.* at 160.

In *Formanek* the court followed the same reasoning as it did in *Loveladies*, to find that the permit denial effected a taking when the property value of the undeveloped land was substantially lower than its projected worth when fully developed. *Formanek*, 26 Cl. Ct. at 339-40. The court also found that the land owners' investment-backed expectations in their property had been frustrated by the denial. *Id.* at 340.

Appendix C

These cases are distinguishable from the Mocks' situation on several grounds. The method of comparing the fair market value of the most profitable use of the property to its market value as a completely undeveloped tract, used in *Loveladies* and *Formanek*, has not been adopted by the United States Supreme Court, and we decline to adopt it here. Because the past decisions of the Supreme Court clearly support the principle that a regulation does not effect a taking when it prevents a property owner from using his land in such a way as to generate the most profit, *e.g.*, *Andrus*, we are convinced that the method used by the Claims Court to calculate diminution in property value is in error.

Furthermore, the Mocks did not argue that the Act here lacked a legitimate public purpose, nor did they prove that their reasonable, investment-backed expectations were destroyed by the department's action, factors which were apparently present in the Claims Court's analysis in *Loveladies* and *Formanek*, respectively. Therefore, although the cases cited by the Mocks involved regulation of wetlands which did go so far as to accomplish a taking, they do not change the outcome of the case before us.

CONCLUSION

Because the department's denial of the Mocks' permit did not render the land valueless, this case does not fit the categorical rule articulated in *Lucas v. South Carolina Coastal Council*. Nor does this case satisfy any of the factors present in a traditional takings analysis, such that the state is forcing the Mocks alone to bear burdens which, in all justice and fairness, should be borne by the public as a whole. *Penn Central Transportation Co.*, 438

U.S. at 123. The department's actions here did not effect a taking of the Mocks' property for which compensation is required.

Accordingly, we affirm the board's decision.

s/ David W. Craig
DAVID W. CRAIG, President Judge

APPENDIX D — DISSENTING OPINION OF JUDGE KELLEY IN THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 25, 1993

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1153 C.D. 1992

ARGUED: November 18, 1992

MR. AND MRS. CONRAD MOCK,

Petitioners

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Judge

DISSENTING OPINION
BY JUDGE KELLEY FILED: March 25, 1993

Appendix D

I respectfully dissent. I believe that the record and exhibits indicate clearly that the Mock property was rendered economically valueless by the denial of the permit by the Department of Environmental Resources.

The site of the property is in a commercial district fronting on a main traffic artery in Bucks County. The exhibits and testimony indicate that there was no feasible way that the property could be developed without encroaching on the wetlands. The Department of Environmental Resources determined preservation of the wetlands as justification for the denial of the permit for construction of commercial utilization of the property.

I believe therefore, that the facts of the instant case do fall within the parameters as determined by *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

I additionally find it most troubling that the Department of Environmental Resources relies upon an evaluation by the Fish Commission for its determinations. The Fish Commission language "would seem likely" as being sufficient justification to justify a negative determination is incomprehensible to me. (*See* Department of Environmental Resources Exhibit No. 27.) Such equivocal language would not support any rightful claims in law in order to sufficiently justify impeding the substantive rights of property.

I would, therefore, find sufficiency in the record that there was a taking by this determination and would accordingly so reverse.

Appendix D

s/ James R. Kelley
JAMES R. KELLEY, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
MAR 25 1993
s/ CR Hostutter
Deputy Prothonotary — Chief Clerk

APPENDIX E — COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD ADJUDICATION ISSUED MAY 1, 1992

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE FIVE
HARRISBURG, PA 17101-0105
717 787 3483
TELECOPIER 717 783 4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EHB Docket No. 90-166-MR
(consolidated)

Issued: May 1, 1992

MR. AND MRS. CONRAD MOCK

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Robert D. Myers, Member
Syllabus

Appendix E

The Board sustains DER's action in denying Appellants' application for a permit authorizing them to place fill on 0.87 acres of wetlands in order to construct an auto maintenance facility. In reaching this result, the Board concludes that Appellants did not fully consider options to reduce or eliminate the impact of their proposed project on the wetlands, that Appellants' proposal to replace the wetlands with 0.38 acres of man-made wetlands did not adequately compensate for the loss, and that the public benefits cited by Appellants did not outweigh the environmental harm. The Board also considers and rejects Appellants' claim that DER's action amounts to an unconstitutional taking of their property, ruling that investment-backed expectations in riparian land must take into account the long history of governmental regulation and the likelihood of future regulation.

Procedural History

Mr. and Mrs. Conrad Mock (Appellants) filed a Notice of Appeal on April 26, 1990 from an April 12, 1990 letter of the Department of Environmental Resources (DER) denying Appellants' Encroachment Permit Application No. E09-357 to place and maintain fill on a tract of land in Plumstead Township, Bucks County. Appellants filed a second Notice of Appeal on December 6, 1990 from DER's denial of their request for Section 401 Water Quality Certification. This appeal was docketed at 90-530-MR and, at the suggestion of the parties, was consolidated into the first appeal (90-166-MR) on January 3, 1991. On March 26, 1991 the Board approved a Partial Stipulation of Settlement that removed the Section 401 Water Quality Certification issue from the consolidated appeals.

A hearing was held in Harrisburg on July 9 and 10, 1991,

before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel and presented evidence in support of their positions. Appellants filed their post-hearing brief on August 28, 1991; DER filed its post-hearing brief on September 27, 1991. Appellants filed a reply brief on October 17, 1991.

The record consists of the pleadings, a partial stipulation of facts, a transcript of 386 pages and 46 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellants are individuals with a mailing address of 102 West Street Road, Feasterville, PA 19047-7817 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations adopted pursuant to said statutes.

3. Appellants are part owners of a 5.2-acre tract of land (Site) in Plumstead Township, Bucks County, purchased in February 1963 by Appellants and others for $9,000 (Stip.[1]; N.T. 29-31).

---

1. The Partial Stipulation of Facts presented at the outset of the hearing (N.T. 3).

Appendix E

4. The Site is located along the east side of Easton Road, U.S. Route 611, L.R. 156, just north of Doylestown, Pa. in an area zoned C-2, Highway Commercial (Stip.; Appellants' Exhibit No. 11(a)).

5. Road frontage along the western (Easton Road) boundary is 267.03 feet. The rear (eastern) boundary is 587.05 feet. While the southern boundary (532 feet) is nearly at right angles with these two, the northern boundary (589.08 feet) veers to the northeast to create a tract much wider in the rear than in the front (Appellants' Exhibit No. 11(a)).

6. Pine Run Creek, flowing in a northeast-southwest direction, meanders through the site along the northern boundary and passes under a bridge located on Easton Road about 50 feet south of the northern boundary. (Appellants' Exhibit No. 11(a)).

7. Much of the Site south and southeast of Pine Run Creek is relatively flat but rises in elevation toward the southeast corner (18 feet above the creek bank) and southwest corner (8 feet above the creek bank). The entire Site is wooded. (Appellants' Exhibit No. 11(a)).

8. All of the Site is within the 100-year floodplan of Pine Run Creek except for the higher-elevation areas in the southeast and southwest corners. These upland areas amount to about 1-1/4 acres. The larger area is in the southeast corner and is separated from the smaller area in the southwest corner by about 100 feet. (Stip.; Appellants' Exhibit No. 11(a)).

9. Slopes in the southeast upland area are 10%-20% (N.T. 55).

Appendix E

10. The relatively flat areas of the Site (3.94 acres) constitute wetlands (Stip; N.T. 150).

11. The land in the vicinity of the Site is highly developed with commercial and industrial establishments. These include a tire store south of the Site, a cement factory east of the Site, a medical facility north of the Site and an oil company, auto dealership and banks west of the Site (across Easton Road). The Site is the only undeveloped land in the immediate vicinity (N.T. 13, 58, 152).

12. The Site has not been occupied, subdivided or developed since Appellants purchased it. Appellants have expended some funds for the payment of taxes and for reservation of sewage connections, and have recovered some of their expenditures by selling part-interests in the Site. Because the Site is undeveloped, the portion bordering Easton Road receives a certain amount of trash tossed into it from the highway. That portion of the Site also experiences some erosion and sediment pollution from a stormwater pipe discharging into it (Stip.; N.T. 14, 28-31, 85-86, 87-88, 227-228; Appellants' Exhibits Nos. 3 and 4).

13. When the minimum yard requirements (front, side and rear), set forth in the Plumstead Township Zoning Ordinance in effect in 1988, are considered, the areas available for development purposes are reduced to 1/100 of an acre in the southwest upland and 1/10 of an acre in the southeast upland. This latter area would be increased by 2/10-3/10 of an acre under the revised yard requirements in the 1989 Zoning Ordinance (Stip.; N.T. 54-55, 100-103, 118; Appellants' Exhibits Nos. 11(a) and 12).

Appendix E

14. In 1979 Appellants filed an application with DER seeking a permit authorizing the placement of a retaining wall along Pine Run Creek and the placement of fill behind it to a height above the 100-year flood elevation. This project would have filled in all of the wetlands on the Site. DER issued a letter accepting the calculations and methodology but stating that permits would not be issued until land development was imminent. No work was done on the project and no permits were ever issued (N.T. 49-52, 97-99).

15. ON December 5, 1985 Appellants entered into an Agreement of Sale with Midas Realty Corporation (Midas), agreeing to convey the Site to Midas for $175,000 but contingent on Midas' securing all necessary permits and approvals for constructing and operating a Midas Muffler Shop on the Site (N.T. 16-17, 52; Appellants' Exhibit No. 2).

16. On February 11, 1986 Midas filed with DER an application for a Water Obstruction Permit authorizing the placement of fill on a portion of the Site for the construction of a Midas Muffler Shop and parking areas (N.T. 52-53, 61-63; Appellants' Exhibits Nos. 11(a) & 13).

17. The Midas project included, *inter alia*, a strormwater detention basin and the extension of a 36-inch reinforced concrete pipe designed to carry off-site runoff to an outlet structure to be constructed in the south bank of Pine Run Creek near the Easton Road bridge (N.T. 63; Appellants' Exhibit No. 11(a)).

18. Submitted as part of the Midas application was a report containing calculations showing that stormwater runoff and 100-year floodplain elevations would not be increased by the proposed project (N.T. 64, 68-71; Appellants Exhibit No. 17).

Appendix E

19. The design of the Midas project satisfied Plumstead Township's standards for stormwater management and floodplain use and Bucks County Conservation District's standards for erosion and sedimentation control (N.T. 71-73; Appellants' Exhibits Nos. 15 & 16).

20. Since the placement of the outlet structure was outside of the floodway, it qualified for a General Permit from DER. Authorization for this aspect of the project was issued by DER on April 29, 1986 (N.T. 63-64; Appellants' Exhibit No. 14).

21. After encountering opposition from officials of DER and the U.S. Army Corps of Engineers (C.O.E.) to the filling in of wetlands, Midas decided to discontinue its permit application and no DER action was ever taken with respect to it (N.T. 77-79).

22. Appellants returned Midas' downpayment and the Agreement of Sale became a nullity (N.T. 17-18).

23. After the Midas sale fell through, Appellants decided to develop the Site themselves by constructing an auto repair facility, a permitted use in the C-2, Highway Commercial District of Plumstead Township (Stip.; N.T. 18).

24. Appellants filed with DER and the C.O.E. a Joint Permit Application seeking authorization for the project. The Application was resubmitted to DER in its entirety (with additional information) on July 11, 1988 (N.T. 82-83; Appellants' Exhibit No. 20).

25. The design of Appellants' project was basically the same as the design of the Midas project. It proposed (a) the filling of 0.87 acres of wetlands, an area roughly 150 feet wide by 240

feet long lying between the two upland areas; (b) the construction of a 5,000[2] square foot building and 37 parking spaces[3] on the filled-in area; (c) the construction of a detention basin east of the parking area; and (d) the extension of the 36-inch reinforced concrete pipe and the installation of the outlet structure near Easton Road (Stip.; N.T. 19, 73-75; Appellants' Exhibit Nos. 11(b)).

26. Appellants' project also proposed a 0.38-acre wetlands replacement area to be created by Appellants in the southeast upland area. Pursuant to this proposal existing wetlands soil would be excavated (from wetland areas to be filled in) and stockpiled. The upland area would be excavated to the elevation of the adjacent wetlands area and the wetlands soil would be placed on it. Wetlands plantings — sedge, sensitive fern, common skunk cabbage, spice bush, silver maple and red ash — would be placed in the replacement area (Stip.; N.T. 75-77; Appellants' Exhibit No. 11 (b)).

27. In addition, Appellants, proposed to place a double row of conifers to separate the wetlands area from the remainder of the Site and to deed-restrict the wetlands area to prevent any future development (Appellants' Exhibit No. 20).

28. Appellants' Application contained copies of approval

---

2. The testimony of Russell G. Benner, Jr. indicated the size to be about 40 feet by 100 feet (N.T. 74). This would amount to 4,000 square feet. However, the Application states 5,000 square feet and our measurements of the building as depicted on Appellants' Exhibit No. 11(b) satisfies us that 5,000 square feet is the more accurate figure.

3. Under the current zoning ordinance 51 parking spaces would be required (Stip.).

letters obtained in connection with the Midas application in 1986. See Findings of Fact Nos. 19 & 20 (Stip.; N.T. 83-84; Appellants' Exhibit No. 20).

29. Included in Appellants' Application was a Comprehensive Environmental Analysis. In this Analysis, Appellants claimed that the net loss of 0.5 acres of wetlands (13% of the total on the Site) was offset by the following public benefits:

(a) elimination of illegal dumping that takes place on the Site adjacent to Easton Road;

(b) reduction in air and noise pollution by the establishment of an auto maintenance facility specializing in replacement of mufflers and air filtration devices;

(c) elimination of erosion and sedimentation pollution from off-site surface water by carrying these flows to Pine Run Creek by extending the 36-inch reinforced concrete pipe;

(d) creation of 20-30 permanent jobs; and

(e) providing an additional auto maintenance facility convenient to the growing population of the area

(N.T. 84-89; Appellants' Exhibit No. 20).

30. Dennis Brown, a fish and wildlife biologist for the U.S. Fish and Wildlife Service, visited the Site on June 22, 1988. As a result of his observations, the Fish and Wildlife Service recommended that the C.O.E. deny Appellants' Application. The

Service's June 28, 1988 letter stated that the "filling of high quality wetlands for building and parking lot construction is clearly inconsistent with the 404(b)(1)[4] Guidelines." (Stip.; N.T. 295-298; DER's Exhibit No. 26).

31. On July 8, 1988 the U.S. Environmental Protection Agency (EPA), relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 143-144; DER's Exhibit No. 28).

32. On July 7, 1988 the Pennsylvania Fish Commission, relying on the Fish and Wildlife Service's observations, recommended that the C.O.E. deny Appellants' Application (Stip.; N.T. 287-288; DER's Exhibit No. 27).

33. Appellants responded to the comments of the Fish and Wildlife Service, EPA, and the Pennsylvania Fish Commission in a letter to the C.O.E. dated July 26, 1988. Among the statements made in this letter, Appellants agreed to pipe waters from a spring (that would be covered with fill) from the mouth of the spring to Pine Run Creek (N.T. 92-93; Appellants' Exhibit No. 21).

34. August 19, 1988 the Pennsylvania Fish Commission, having reviewed Appellants' Application, recommended that DER deny the Application. The reviewer's comments made light of the public benefits that Appellants cited and observed that they could be provided just as easily from an alternative upland location (Stip.; N.T. 282-287; DER's Exhibit No. 29).

---

4. The reference is to section 404(b)(1) of the Clean Water Act, Public Law 92-500, 82 Stat. 816, 33 U.S.C.A. §1344(b)(1).

35. The Pennsylvania Fish Commission also advised DER on the same date that Pine Run Creek is a warmwater fishery with low fishing pressure. As such, it would be used primarily as a bait fishery — providing minnows for use elsewhere (N.T. 285, 292-293; DER's Exhibit No. 29).

36. On September 23, 1988 DER notified Appellants of its concern about the impact of the proposed project on the wetlands. Appellants were instructed to provide additional information and justification with respect to 5 specific concerns related to 25 Pa. Code §105.14, §105.15 and §105.16 (N.T. 146-147; DER's Exhibit No. 4).

37. Appellants responded to DER's September 23, 1988 letter on September 30, 1988, enclosing a copy of their July 26, 1988 letter to the C.O.E. (See Finding of Fact No. 33). At the conclusion of their response, Appellants informed DER that no additional clarification of their position could be provided and that DER should take action on their Application (N.T. 89-92; Appellants' Exhibit No. 21).

38. Applications for Encroachment Permits are reviewed by DER by considering the factors listed in 25 Pa. Code §105.14(b).[5] If that review discloses the potential for significant environmental harm, then under the provisions of §105.16(a) DER consults with the applicant to examine ways to reduce or eliminate the harm. This includes consideration of mitigation measures defined in §105.1. DER also consults with other governmental agencies. If, after these consultations, DER is still

---

5. Chapter 105 of the regulations was substantially revised effective October 12, 1991. The references to sections of Chapter 105 in this Adjudication are to versions in existence on April 12, 1990 when the Application was denied.

convinced that significant environmental harm will occur, then the public benefits of the project are evaluated and weighed against the environmental harm. The benefits must outweigh the harm in order to justify issuance of a permit to place fill in wetlands (N.T. 133-135).

39. Most of DER's review of Appellants' Application was performed by Roland Bergner, a water pollution biologist, but he left his position with DER prior to making a final recommendation on the Application. Richard C. Shannon, Jr., another water pollution biologist, completed the review by utilizing the material already in the file (N.T. 129, 138-139).

40. Shannon concluded that only 2 of the 10 factors listed in §105.14(b) were of concern — (a) the effect on water quality and aquatic habitat, and (b) the need to be located in close proximity to water (N.T. 159-164).

41. Having concluded that the project would involve the potential for significant environmental harm, Shannon then considered Bergner's consultations with Appellants, examining ways to reduce or eliminate the harm by utilizing mitigation measures in §105.1. Shannon concluded (a) that Appellants had not fully addressed factor (i) by considering alternative uses and alternative sites, (b) that factor (ii) was not applicable, (c) that Appellants had addressed factor (iii) by proposing a buffer zone and deed restrictions, (d) that the replacement wetlands proposed with respect to factor (iv) were not sufficient either in size or quality to be a suitable substitute, and (e) that replacement wetlands could not properly be considered, in any event, since Appellants had not adequately considered factor (i) (N.T. 166-172).

Appendix E

42. Still convinced that significant environmental harm would occur, Shannon evaluated the public benefits of the project and weighed them against the environmental harm. he concluded that the benefits claimed by Appellants (Finding of Fact No. 29) were marginal at best, and not enough to outweigh the environmental harm (N.T. 173-182).

43. Shannon prepared a Record of Decision on October 27, 1989 recommending denial of the Application for three reasons:

(a) an auto repair facility is not a water dependent activity;

(b) the loss of wetlands will eliminate fish and wildlife habitat, alter flood storage capabilities and decrease water quality improvement; and

(c) the lack of any demonstrated public benefits sufficient to offset the environmental harm.

(N.T. 182; DER's Exhibit No. 7).

44. Shannon visited the Site on January 25, 1990, found the wetlands to be exceptional, in his opinion, and took a number of photographs (N.T. 149-156; DER's Exhibits Nos. 10 through 21).

45. Shannon's supervisor, Khervin D. Smith (Chief of the Environmental Review Section of the Division of Rivers and Wetland Conservation), agreed with Shannon's conclusions and recommended denial of the Application (N.T. 320, 323-325).

46. Eugene E. Counsil (Chief of the Division of Waterways

and Stormwater Management) reviewed Shannon's and Smith's recommendations, agreed with them and recommended to his superior, Joseph J. Ellam (Director, Bureau of Dams and Waterways Management), that the Application be denied (N.T. 353-354, 356-358).

47. The Application was denied in a letter dated April 12, 1990 and signed by Ellam (Stip.; N.T. 358; DER's Exhibit No. 9).

48. In August 1990 Appellants met with representatives of DER to discuss possible alternatives to the design of the project that would address DER's concerns. DER officials made two suggestions: develop the Site as a wetlands nursery; or limit commercial development to the upland area in the southeast corner of the Site with access provided from the Easton Road either by securing permission to use an existing access road on the land south of the Site or by constructing a bridge over the wetlands separating the two upland areas on the Site (N.T. 19-20, 359-360).

49. Developing the Site as a wetlands nursery did not make sense to Appellants (N.T. 20).

50. Appellants were unsuccessful in gaining permission to use the access road on the land south of the Site. Besides, they considered the idea of limiting commercial development to the uplands in the southeast corner of the Site to be unsound for the following reasons:

(a) too little visibility;

(b) too close (30-40 feet) to the noise and dust of the cement factory;

(c) too little developable space — 1/10 acre to 4/10 acre (N.T. 20-22, 38-40, 43, 56-58, 80, 118; Appellants' Exhibit No. 5).

51. Placing the proposed commercial development, as presently designed, in the southeast corner of the Site would still impact about .5-acre of wetlands (N.T. 373-379; Appellants' Exhibit No. 25).

52. Plumstead Township's Zoning Ordinance lists 25 categories of uses permitted by right in the C-2 Highway Commercial District, 3 categories of uses permitted by conditional use and 17 categories of uses permitted by special exception. The uses encompass a broad range of commercial, office and institutional activities (N.T. 60; Appellants' Exhibit No. 12).

53. Subsequent to DER's denial of their Application, Appellants sought and obtained a reduction in the assessed value of the Site for Tax purposes from $5460 to $650 (N.T. 23-25; Appellants' Exhibit No. 8).

54. The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 (the amount offered by Midas) or more (N.T. 16, 25, 80-82, 94; Appellants' Exhibit No. 9).

55. The wetlands on the Site are classified as palustrine forested wetlands with substantial areas of scrub/shrub wetlands and emergent wetlands. This diverse system provides high quality habitats for certain fish and wildlife species and is valuable for water quality improvement and flood storage (N.T. 149-157, 297).

56. Appellants' proposed project would completely destroy 0.87 acres of these wetlands, eliminating their ability to function as a habitat for fish and wildlife species and to provide water quality improvement and flood storage (N.T. 158-159).

57. Most wetlands in the Doylestown area exist along stream corridors and provide important refuges for wildlife in the midst of highly developed areas (N.T. 152, 298).

58. The wetlands on the Site are classified by the Fish and Wildlife Service as Category 2 — wetlands which are considered replaceable — rather than Category 1 — wetlands too unique to be replaced. Category 1 wetlands would all be considered "important" wetlands as defined in 25 Pa. Code §105.17(a) (N.T. 315-318).

59. DER did not treat the wetlands on the Site as "important" wetlands during its consideration of Appellants' Application. Shannon and Smith now believe that the wetlands are "important" (N.T. 183-184, 340).

DISCUSSION

Appealing from a permit denial, Appellants have the burden of proof: 25 Pa. Code §21.101(c)(1). To carry the burden, Appellants have the burden of proof: 25 Pa. Code §21.101(c)(1). To carry the burden, Appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion: 25 Pa. Code §21.101(a).

Appellants make two arguments. The first, to which they devoted most of their brief, is that DER's denial of the Application constitutes an unconstitutional taking of their

property. The second, stated as an alternative, is that the permit should have been granted. Unfortunately, they barely outline the second argument. It seems to us that, before considering whether the denial amounts to an unconstitutional taking, we need to determine whether the denial was supported by statute and regulation and was an appropriate exercise of DER's discretion.

There is no suggestion that Appellants could have proceeded with their project without a permit. Section 6(a) of the DSEA, 32 P.S. §693.6(a), mandates a permit for every water obstruction or encroachment, including the placement of fill (see definitions in §3, 32 P.S. §693.3). To be entitled to a permit, Appellants had to show compliance with the provisions of the DSEA and of the regulations adopted under it: §9(a), 32 P.S. §693.9(a). Those regulations constitute Chapter 105 of 25 Pa. Code and, more specifically, the sections on permit application processing at §105.14 and §105.16. In addition, §105.17 and §105.411(3) are potentially applicable where wetlands are involved.

The procedure to be followed in reviewing applications is set forth in §105.14 where 10 specific factors are listed for DER's consideration. Shannon found only 2 of these factors to cause concern — the effect of the project on water quality and aquatic habitat (§105.14(b)(4)), and the need for the project to be located near water (§105.14(b)(7)). Appellants made no effort to undermine or rebut Shannon's findings in this regard, and we find them to be reasonable. Obviously, these concerns involved the potential for significant environmental harm, requiring DER to proceed under §105.16(a) by consulting with Appellants and other governmental agencies.

DER held such consultations, one purpose of which was to

explore ways to reduce the potential environmental harm to a minimum. This included "mitigation", defined in §105.1 as follows:

> an action or actions undertaken to:
>
> (i) minimize impacts by limiting the degree or magnitude of the action and its implementation;
>
> (ii) rectify the impact by repairing, rehabilitating, or restoring the impacted environment;
>
> (iii) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; or
>
> (iv) if the results listed in subparagraphs (i)-(iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

DER determined that factor (ii) was inapplicable and that factor (iii) had been adequately addressed by proposals for a buffer zone and deed restriction. We need to focus only on factors (i) and (iv). Potential ways to minimize environmental impacts under factor (i) are relocating the project off-Site, confining it to the upland areas on-Site, reducing the size, or changing the use. Since an auto repair facility does not have to be located near water, it is not a use bound by its nature to a wetland environment. For this reason, there is less justification for tolerating the impact

on wetlands when a facility of this sort is proposed. DER was correct in concluding that Appellants had not given this option serious consideration.

Confining development to the upland areas was considered, however, and rejected by Appellants. Since most of the upland area is in the southeast corner of the Site, it follows that the proposed building and parking areas would have to be located there. Appellants found this objectionable from a business standpoint. First of all, the facilities would have low visibility from Easton Road — located at the rear of a wooded Site. Second, they would be too close to the noise and dust of the cement factory. DER made no effort to counter this testimony, and we will accept it as reasonable. It is also apparent that, even if the facilities were placed in the southeast corner of the Site, it would still be necessary to destroy wetlands in the course of building an access road. Appellants estimate that the impacted area — 1/2 acre — would be similar to the net impact of their project as proposed.

Nothing in the record suggests that Appellants considered reducing the size of the project or changing it to a different use.

DER maintains that, since Appellants did not fully satisfy factor (i), the proposal for replacement wetlands under factor (iv) could not technically be considered. Despite this legal position, DER reviewed the replacement proposal and found it to be inadequate because it involved the replacement of 0.87 acres of natural wetlands by only 0.38 acres of manmade wetlands. Appellants made no claim that their proposal constituted an appropriate replacement. They simply pointed out that no other space was available on the Site to construct replacement wetlands. While this certainly is true on the basis of their project

as designed; it overlooks the possibility that the proposed facility could be reduced in size and the possibility that on-Site wetlands can be supplemented by off-Site wetlands. We agree with DER that Appellants' replacement proposal does not "compensate"[6] for the environmental impact by "replacing or providing substitute resources or environments" as stated in factor (iv).

Convinced that, after considering mitigation measures, significant environmental harm would still occur, DER was required by 25 Pa. Code §105.16 to evaluate the public benefits of the proposed project and weigh them against the environmental harm. DER went through this procedure and concluded that the harm outweighed the benefits. Appellants did little to challenge this conclusion. Our review of the benefits cited by Appellants leads us to the same conclusion reached by DER. Of the 5 benefits listed, 2 pertain to the Site itself and 3 pertain to the proposed auto maintenance facility. In the former category are elimination of illegal dumping and elimination of erosion and sediment pollution. The evidence of dumping along Easton Road indicates that this is a minor matter that, if important enough, could be controlled by fencing or some other device. Similar comments can be made about erosion and sediment pollution. To the extent this is a problem, it can be corrected by extending the 36-inch reinforced concrete pipe to the creek bank — work authorized in 1986 by the General Permit issued by DER.

---

6. "Compensate": to be equivalent to. Webster's Ninth New Collegiate Dictionary 1987.

"Compensation": giving an equivalent or substitute of equal value. Black's Law Dictionary, Revised Fourth Edition 1968.

Appendix E

The benefits of the proposed auto maintenance facility — reduction of air pollution, creation of 20 to 30 jobs and fulfillment of a need for such facilities — would result no matter where the facility is placed. They are not site specific. Appellants have not shown that other sites suitable for this type of business do not exist in the Doylestown area and that the benefits will not occur if Appellants' Site is not used. Without such a showing, we cannot assign great weight to these 3 benefits. Even when all 5 are lumped together, they fail, in our judgment, to outweigh the environmental harm associated with the loss of wetlands in a rapidly urbanizing region of the Commonwealth.

Because the harm will outweigh the benefits, DER was prohibited by §105.16 and by §105.411(3) from issuing a permit. We find the denial to be lawful and an appropriate exercise of DER's discretion.

Before leaving this issue, however, we feel compelled to comment on DER's eleventh-hour attempt to characterize the wetlands on the Site as "important." Wetlands in this category are accorded greater protection by special criteria set forth in 25 Pa. Code §105.17. Part of this protection stems from the fact that mitigation measures (including replacement) are not considered. Appellants' Application was not reviewed under §105.17 because DER did not consider the wetlands to be "important." Shannon changed his thinking on that point sometime after his deposition on November 13, 1990 and near the end of his direct testimony at the hearing on July 9, 1991 (N.T. 188-189). There is no suggestion in DER's pre-hearing memorandum (filed April 18, 1991) or its filing in response to Pre-Hearing Order No. 2 (filed July 1, 1991) that the appeal would be defended, at least in part, on the ground that the wetlands are "important."

Appendix E

Appellants made no motion to strike this part of Shannon's testimony or to contest it in any other fashion, perhaps because they viewed it as enhancing their taking claim or perhaps because their cross-examination uncovered a rationale that can only be termed sophistry. We will not burden this Adjudication with a discussion of the rationale because DER has not convinced us that the wetlands are "important." The characteristics cited by Shannon, while vital to "important" wetlands, are typical of what can be found in nearly all wetlands. Unless we are to treat all wetlands as "important," we fail to see how these characteristics should be accorded greater protection on the Site than they receive elsewhere.[7]

We now turn our attention to Appellants' claim that denial of the permit constitutes an unconstitutional taking of their property. DER asserts (for the first time in its post-hearing brief) that the Board has no jurisdiction to rule on this issue. Litigants often raise constitutional issues in proceedings before the Board and our authority to rule on them has not, to our knowledge, previously been questioned. Like all administrative agencies, we lack the power to declare a statute unconstitutional. But where a litigant concedes the constitutionality of the statute but claims that DER's manner of administering it impinges on constitutional rights or protections, we rule on such claims as a necessary part of determining whether DER acted in an unlawful manner or abused its discretion.[8] Such claims have included the

---

7. We note that the "important" classification has been abandoned in the revised Chapter 105 of the regulations in favor of what appears to be a more workable distinction between those wetlands too valuable to be affected and those that are not.

8. For some representative cases, see *John R. Yenzi, Jr. v. DER*, 1988 EHB 643 (due process clause); *Chambers Development Company, Inc. et al. v. DER*, (Cont'd)

unconstitutional taking of property on at least one occasion: *Willowbrook Mining Company v. DER*, 1984 EHB 333, in which our decision was affirmed by Commonwealth Court, 92 Pa. Cmwlth. 163, 499 A.2d 2 (1985) without any suggestion that we exceeded our jurisdiction.

DER argues, however, that the Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. §1-201 *et seq.*, provides the "complete and exclusive procedure and law" applicable to the taking of property for public purposes: 26 P.S. §1-303, including *de facto* takings referred to in 26 P.S. §1-502(e). With such a statute establishing an exclusive remedy and vesting exclusive jurisdiction in the Courts of Common Pleas, DER asserts, the Board is deprived of any jurisdiction it otherwise might have to rule on such an issue.

This argument is persuasive on its face, but ignores appellate court decisions construing the Eminent Domain Code. The seminal case, *Gaebel v. Thornbury Township, Delaware County*, 8 Pa. Cmwlth. 379, 303 A.2d 57 (1973), held that a claim for *de facto* taking cannot be filed under the Eminent Domain Code where the taking involves the exercise of the police power. The property owner must first challenge the constitutionality of that exercise by the means provided by the Legislature. In the case of a zoning ordinance, as was involved there, the challenge must be made through procedures contained in the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq.*

(Cont'd)
1988 EHB 68 (commerce clause; contracts clause); and *Dale A. Torbert et al. v. DER*, 1989 EHB 834 (Fourth Amendment). Of course, the provisions of Article I, Section 27, of the Pennsylvania Constitution frequently are cited to us as they were by DER on page 54 of its post-hearing brief.

Appendix E

The *Gaebel* decision was followed in a number of subsequent cases, including *Reilly v. Commonwealth, Dept. of Environmental Resources*, 37 Pa. Cmwlth. 608, 391 A.2d 56 (1978); *Kraiser v. Horsham Township*, 72 Pa. Cmwlth. 16, 455 A.2d 782 (1983); and *Merlin v. Commonwealth*, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983). Like the MPC, the DSEA represents an exercise of the Commonwealth's police power. Any claim that the exercise of that power by DER amounts to an unconstitutional taking of property must be pursued through the procedures contained in the statute — appeal to this Board: 32 P.S. §693.24(a). We clearly have the jurisdiction to consider it.

The Fifth Amendment to the U.S. Constitution and Article I, Section 10, of the Pennsylvania Constitution both prohibit the taking of property for public use without the payment of just compensation. While these protections have been enforced with little difficulty where the taking consists of actual governmental appropriation and use of the property, enforcement has proved troublesome where the taking consists of governmental regulation of the use of the property. The courts have been unsuccessful in drawing a reliable line dividing regulations that do not constitute a taking and those that do. Such boundaries as are discernible have been influenced more by the facts of each particular case than by any application of legal dogma.

State regulation is based upon the police power. In order to pass constitutional muster at the federal level, the Commonwealth's exercise of the police power through the DSEA and Chapter 105 of 25 Pa. Code must satisfy the three-prong test articulated by the U.S. Supreme Court in *Lawton v. Steele*, 152 U.S. 133 (1894). Thus, (1) the interests of the public must require it, (2) the means chosen must be reasonably necessary for the accomplishment of the purpose, and (3) the

means chosen must not be unduly oppressive upon individuals. Appellants concede that the first two prongs have been satisfied and maintain that only the third prong is in issue. They claim that their property is rendered valueless by the denial of their permit application, causing them a loss of at least $175,000, and placing upon them an unduly oppressive burden which they are being forced to bear alone for the public benefit.

To constitute a taking, a regulation must deprive the owner of *any* reasonable use of the property. If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: *Andrus v. Allard*, 444 U.S. 51 (1979), or results in a significant reduction in value: *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In considering Appellants' contention that DER's action has deprived them of any reasonable use of the Site, it is important to note that DER's action has not interfered in any manner with the present and historical use of the Site. That is significant: *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), because it focuses attention solely on Appellants' investment-backed expectations for prospective use.

There is no evidence of what Appellants' intentions were when they purchased the Site in 1963. Since they never put the place to any use, it is reasonable to assume that they intended from the start to develop it for some commercial, residential or other purpose. The nature of the Site should have made it apparent to them at the outset that development would necessitate filling in some or all of the wetlands. Being able to do this was absolutely essential to realizing their investment expectations; and yet, they never possessed absolute freedom to go ahead with it.

Appendix E

The Site is riparian land — the subject of regulation for centuries. Even at common law, the owner of such land could not place obstructions on it without regard to the interests of others: *White v. Pennsylvania R. Co.*, 354 Pa. 397, 47 A.2d 200 (1946). Statutory law has regulated it in Pennsylvania at least since 1913 when the predecessor to the DSEA was enacted (see Act of June 25, 1913, P.L. 555, now repealed). Appellants' investment-backed expectations had to take into account the possibility that land already subject to long-standing regulation might have additional restrictions imposed upon it: *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (U.S.C.A., 3d Cir., 1987). "One buys land as it is . . . ," *Helms v. Zeitzeff*, 407 Pa. 482, 181 A.2d 277 at 278 (1962). They could not realistically be confident that they would be able to place fill on the Site — especially in areas within the 100-year floodplain.[9]

To the extent Appellants' investment-backed expectation relied upon the placement of fill for commercial, residential or institutional development it was too speculative to be given the constitutional protection Appellants seek. It follows that even the complete destruction of that expectation by government regulation cannot be considered a taking. We are not convinced, however, that a complete destruction has been demonstrated.

DER's action was to deny permission for Appellants to proceed with a specific project design. It does not go beyond that point. A wide variety of uses are allowed in the C-2, Highway Commercial District (see Finding of Fact No. 52). Appellants'

---

9. Our conclusion here remains despite Appellants' 1979 application for a permit to build a retaining wall and place fill behind it. Although Appellants assert some DER acceptance of the idea, no approval was given and no permits were issued.

engineer concluded that none of these uses would have a lesser impact upon the wetlands. While this conclusion was not challenged by DER, we are unwilling to accept it without knowing the details on which it is based. Common sense tells us that some of the other permitted uses do not require a 5,000 square foot building and may not require as many parking spaces. Any reduction in size would almost certainly involve a reduction in the amount of wetlands to be affected, perhaps inducing DER to issue a permit. Since Appellants did not seek approval for a smaller facility, we cannot conclude that they will be denied any use of the wetlands: *Penn Central Transportation Co. v. New York City, supra.*

We conclude that DER's action is not unduly oppressive upon Appellants and that, therefore, the third prong of the *Lawton v. Steele* test is fulfilled. This exercise of the police power is constitutional.

In reaching this conclusion, we have cited and relied primarily on cases construing the Fifth Amendment to the U.S. Constitution. We have done so because the Pennsylvania Appellate Court decisions construing Article I, Section 10, of the Pennsylvania Constitution have consistently followed the federal cases. We have reviewed the Pennsylvania Supreme Court's recent decision in *United Artists Theater Circuit v. City of Philadelphia*, __ Pa. __, 595 A.2d 6 (1991), which appeared to depart from this tradition. We are satisfied that it does not affect our holding. Accordingly, both the U.S. and Pennsylvania Constitutions support the action challenged in this appeal.

Appendix E

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of the consolidated appeal.

2. Appellants have the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying Appellants' Application.

3. Appellants did not fully satisfy factor (i) in the definition of "mitigation" in 25 Pa. Code §105.1 by considering options to minimize or eliminate the impact of their proposed project on the wetlands.

4. Appellants' proposal for replacement wetlands did not satisfy factor (iv) in the definition of "mitigation" in 25 Pa. Code §105.1 because its size and quality did not compensate for the impact of their proposed project on the wetlands.

5. The public benefits cited by Appellants for their proposed project did not outweigh the environmental harm of destroying 0.87 acres of wetlands and eliminating their capacity to function as a fish and wildlife habitat and to provide water quality improvement and flood storage.

6. DER was prohibited by 25 Pa. Code §105.16 and §105.411(3) from approving Appellants' application and issuing a permit.

7. The wetlands on the Site are not "important" wetlands as defined in 25 Pa. Code §105.17.

8. The Board has jurisdiction to rule on Appellants' claim

that DER's denial of their Application amounts to an unconstitutional taking of their property.

9. DER's action was not an unconstitutional taking of Appellants' property.

10. DER's action was lawful and an appropriate exercise of discretion.

ORDER

AND NOW, this 1st day of May, 1992, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

s/ Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

s/ Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

s/ Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

Appendix E

Board Member Terrance J. Fitzpatrick has a concurring opinion which is attached.

DATED: May 1, 1992

cc: Bureau of Litigation
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeast Region
For the Appellant:
Jonathan E. Rinde, Esq.
Joseph M. Manko, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

sb

APPENDIX F — COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, CONCURRING OPINION OF BOARD MEMBER TERRANCE J. FITZPATRICK ISSUED MAY 1, 1992

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE FIVE
HARRISBURG, PA 17101-0105
717 787 3483
TELECOPIER 717 783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

EHB Docket No. 90-166-MR
(consolidated)

Issued: May 1, 1992

MR. AND MRS. CONRAD MOCK

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

CONCURRING OPINION OF BOARD MEMBER TERRANCE J. FITZPATRICK

I agree with the conclusions and the reasoning in the board's Opinion. I file this Concurring Opinion only to add a comment of

my own regarding the takings issue. The U.S. Supreme Court has recognized that in deciding whether a taking has occurred, it is necessary to weigh the public and private interests involved. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 492 (1987). In cases such as the present one, where a landowner's use of his property has been restricted pursuant to laws designed to protect the environment, I believe it is necessary to remember that we are dealing with land. While land is a form of property, it differs from buildings, bank notes, and automobiles in that all forms of life are biologically dependent upon it. It does not bode well for the future if we insist on treating land as if it were nothing more than an economic commodity.[1]

In my view, when a person asserts that his land has been taken due to environmental restrictions, he should face a heavier burden than in other types of takings cases.

ENVIRONMENTAL HEARING BOARD

s/ Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge Member

DATED: MAY 1, 1992

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeast Region

---

1. See the discussion of the "land ethic" in Aldo Leopold, "A Sand County Almanac" (Oxford Univ. Press, 1987) pp. 201-226.

Appendix F

For Appellant:
Jonathan E. Rinde, Esq.
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

jm

APPENDIX G — LETTER OF JOSEPH J. ELLAM, ACTING DIRECTOR, BUREAU OF DAMS AND WATERWAY MANAGEMENT, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, DENYING PERMIT APPLICATION No. E 09-357 DATED APRIL 12, 1990

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Post Office Box 8554
Harrisburg, Pennsylvania 17105-8554
April 12, 1990

717-541-7900

Bureau of Dams and Waterway Management

CERTIFIED MAIL NO. P 899 341 595

Mr. and Mr. Conrad Mock
102 West Street Road
Feasterville, PA 19047-7817

Re: Encroachment Permit Application
DER File No. E 09-357

Dear Mr. and Mrs. Mock:

Please accept this letter as the Commonwealth of Pennsylvania, Department of Environmental Resources' response to your Permit Application No. E 09-357 to place and maintain fill on approximately 0.87 acres of wetlands in Plumstead Township, Bucks County. The purpose of the proposed fill is for site development to facilitate the construction

of an auto maintenance facility on property owned by you. Your permit application and the documents you submitted subsequent thereto are herby incorporated by reference into this notice as if set forth in full.

A review of your application has been completed by the Department based upon the requirements of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P S. Section 691.1 *et seq.*; the Pennsylvania Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. Section 693.1, *et seq.*, and upon Chapter 105 of the Commonwealth's Regulations, 25 Pa. Code Chapter 105. Based upon that review, your permit application is hereby denied for the following reasons:

1. A review of the site and plans filed with the application confirmed that the area proposed to fill constitutes a wetland as that term is defined in 25 Pa. Code Section 105.1.

2. Your application does not adequately address the impact of the proposed fill upon the regimen and ecology of the body of water, water quality, streamflow, fish and wildlife and aquatic habitat, as required by 25 Pa. Code Section 105.14(b)(4).

3. Your application does not demonstrate that other alternatives do not exist to attain the proposed project purpose with those alternatives lessening the adverse impact to the wetland in question, as required by 25 Pa. Code Section 105.14(b)(7).

4. Your application does not demonstrate that the public benefit of the proposed project outweigh the harm to the

environment and public natural resources, as required by 25 Pa. Code Section 105.14(b). Consequently, the Department may not approve the application to discharge fill material into the wetland according to 25 Pa. Code Section 105.411(3).

In summary, based upon the Department's review of your application, the materials submitted with it, and the criteria set forth in the above cited regulations, the Department finds the proposed fill would result in destruction of aquatic habitat which would not be outweighed by a countervailing public benefit. For these reasons, your application for a permit is hereby denied.

This action of the Department may be appealable to the Environmental Hearing Board, 101 South Second Street, Suites 3-5, Harrisburg, PA 17101, (717-787-3483) by any aggrieved person pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies Or the appeal form and regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

Sincerely,

s/ Joseph J. Ellam
Joseph J. Ellam, P.E.
Acting Director
Bureau of Dams and Waterway Management
Department of Environmental Resources

FILED
APR 22 1996
CLERK

(2)

No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CONRAD MOCK and BARBARA MOCK,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

DENNIS W. STRAIN
MARTHA E. BLASBERG
Office of Chief Counsel
Department of Environmental Protection
P.O. Box 8464
Harrisburg, PA 17105-8464
(717) 787-7060

Counsel for the Commonwealth of Pennsylvania, Department of Environmental Protection, Respondents

---

27AP

QUESTION PRESENTED

Did the denial of the Mocks' application for a permit to place fill in wetlands deny the Mocks all economically beneficial use of their property?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

RESPONDENT'S STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....6

ARGUMENT.....7

I. PETITIONERS ATTEMPT TO SEEK REVIEW FROM THIS COURT OF QUESTIONS WHICH WERE NEVER PRESENTED TO THE PENNSYLVANIA COURTS.....7

II. THE FACTS ESTABLISHED IN THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONERS.....8

III. THE PENNSYLVANIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*.....12

IV. THE DECISIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEAL.....17

V. NO COMPELLING REASONS EXIST TO JUSTIFY A GRANT OF REVIEW ON CERTIORARI.....20

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases **PAGE**

Dolan v. City of Tigard, ___ U.S. ___,
114 S.Ct 2309 (1994).....15, 16

Florida Rock Industries, Inc. v. United States,
18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*,
___ U.S. ___, 115 S.Ct. 898 (1995).....17, 19

Florida Rock Industries, Inc. v. United States,
791 F.2d 893 (Fed. Cir. 1986), *cert. denied*
479 U.S. 1053, 107 S.CT. 926 (1987).....18, 19

Florida Rock Industries, Inc. v. United States,
8 Cl. Ct 160 (1985), *rev'd.* 791 F.2d 893
(Fed. Cir. 1986).....18

Lucas v. South Carolina Coastal Council,
508 U.S. 1003, 112 S.Ct. 2886 (1992).....6-8, 10-14, 17, 20-21

Loveladies Harbor, Inc. v. United States,
21 Cl. Ct. 153 (1990), *aff'd* 28 F.3d 1171
(Fed. Cir. 1994).....16, 17, 19

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340, 106 S.Ct. 2561 (1986).....18

Mock v. Commonwealth, DER, 154 Pa. Commw. 380,
623 A.2d 940 (1993).....6, 11, 13-15

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393,
43 S.Ct. 158 (1922).....21

Statutes, Rules and Regulations **PAGE**

Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* 2

Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§ 1340.101 *et seq.* 1

Sup. Ct. R. 10 ..... 13, 20

Sup. Ct. R. 14.1.(g)(i) 8

25 Pa. Code Chapter 105 2

25 Pa. Code § 105.1 5

Respondent Commonwealth of Pennsylvania, Department of Environmental Protection ("the Department")[1], hereby opposes the Petition for Writ of Certiorari filed by Conrad and Barbara Mock ("the Mocks").

RESPONDENT'S STATEMENT OF THE CASE

The Mocks are part owners of a property purchased in February, 1963 by Conrad Mock and his brother, Edgar Mock, for a total purchase price of $9,000. Two 25% shares in the property were subsequently sold to individuals named John Alliger and Tom Rowan for $4,000 per share. A further division of the property interests occurred when Tom Rowan died and his interest was divided between Conrad Mock and John Alliger. The dates of these property transfers are unknown from the record below; all that is known is that the last transfer took place some time after 1985. The precise nature of Barbara Mock's interest in the property is not clear on the record below; all that was established is that she is a part owner.

The 5.2 acre site has approximately 3.94 acres of delineated wetlands and approximately 1 1/4 acres of "uplands" or non-wetlands acreage. All but the upland areas are within the 100-year floodplain of Pine Run Creek, which runs along the northern boundary of the site.

---

[1] At the time of the administrative action at issue, the Department was known as the Department of Environmental Resources ("DER"). In 1995, under the *Pennsylvania Conservation and Natural Resources Act*, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§ 1340.101 *et seq.*, the Pennsylvania General Assembly split DER into two agencies: the Department of Environmental Protection and the Department of Conservation and Natural Resources. For purposes of the permitting action at issue, the Department of Environmental Protection is the successor agency.

The property has not been subdivided or developed since its purchase. The property owners pursued one offer to purchase the land in the mid-eighties when Conrad Mock entered into negotiations with Midas Realty Corporation. Midas intended to build an automotive repair facility on the site. Conrad Mock, Edgar Mock, John Alliger and Tom Rowan entered into an agreement of sale with Midas which provided for a purchase price of $175,000 and a deposit to be made of $17,500. The agreement provided that the deposit would be non-refundable after January 31, 1986, but the deposit was apparently never made.

PERMIT APPLICATION PROCESS

Midas applied to the Department in February, 1986 for a permit to allow the fill necessary to develop the wetlands but, because of the time delays they believed would be involved in pursuing the permit, they lost interest in the property. The property owners agreed to release Midas from the agreement of sale because they believed that developing the property themselves presented a much more valuable option than selling it to Midas. No subsequent attempts have been made to sell the property.

Consistent with the decision to develop the property, the Mocks submitted an application to the Department.[2] The Mocks sought approval for the placement of fill in approximately 0.87 acres of the wetlands on site, to allow the construction of an automotive repair facility. The Mocks offered to offset the loss of

---

[2] The Department regulates activities in wetlands under the provisions of the *Dam Safety and Encroachments Act*, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* and the rules and regulations adopted pursuant to the Act, specifically 25 Pa. Code Chapter 105. The Chapter 105 regulations were substantially amended in 1991, but the Mocks' permit application was submitted and reviewed under the regulations in effect prior to the 1991 amendment.

0.87 acres of wetlands with the construction of a new wetland area on the property of 0.38 acres in size.

The Department conducted a preliminary review of the application and concluded that the project, as proposed, presented the potential for significant adverse environmental impact. By letter dated September 23, 1988, the Department informed the Mocks of the results of the preliminary review, and requested that the Mocks submit information addressing the Department's concerns, specifically: (1) the proposed project's potential for adverse environmental impact; (2) the fact that the proposed facility did not need to be located on or near the wetlands, that is, that the proposed project was not water-dependent; (3) the fact that the application did not address alternatives for the project which could significantly reduce the projected adverse environmental impacts. The Department also requested that additional justification be provided to justify and document the need for the proposed project.

In October, 1988, the Department contacted the Mocks' engineering consultant, Russell Benner, and recommended that the Mocks revise their proposal to limit proposed construction to the uplands portion of the property. Benner indicated that he would prepare the revised plans for construction in the uplands, and pursue the variances necessary from Plumstead Township to allow construction in this area. However, no proposal for construction in the uplands was ever submitted to the Department, and no variances were ever sought from Plumstead Township.[3]

The Mocks responded to the Department's preliminary review letter by letter dated September 30, 1988. The letter asked that the Department proceed to either approve or deny the

---

[3] There was, in fact, no evidence that the Mocks, in preparing the proposal for construction in the wetlands, sought variances from any of the Township building requirements, such as setback distances or the number of parking spaces.

application on the basis of the information provided in the letter, as the Mocks would not provide any further response to the Department's concerns. The letter did not offer the analysis of less environmentally damaging alternatives requested by the Department.

The Department completed review of the application on the basis of the information submitted. The Department concluded that the Mocks' application did not demonstrate that the project, as proposed in the application, minimized or avoided the threatened environmental harm to the maximum extent possible, and that the Mocks had not exhausted the possibilities for redesign and relocation on the site. By letter dated April 12, 1990, the Department denied the permit application.

PROCEDURAL HISTORY

The Mocks appealed this decision to the Environmental Hearing Board, contending that the Department had improperly denied the permit application and that the denial had resulted in a taking of their property. The Board's adjudication, issued on May 1, 1992, held that the Department had correctly denied the permit application, and that the denial did not constitute a taking under either state or federal law. *Mock v. Commonwealth, DER*, 1992 EHB 537.

The Board found that the Department had correctly determined that the project, if approved, would cause significant environmental harm.

> Appellants' proposed project would completely destroy 0.87 acres of these wetlands, eliminating their ability to function as a habitat for fish and wildlife species and to provide water quality improvement and flood storage.

1992 EHB at 548-549. The Board then considered whether the Mocks had taken adequate steps to mitigate the threatened environmental harm. Mitigation is defined at 25 Pa. Code § 105.1 as follows:

> (i) Minimize impacts by limiting the degree or magnitude of the action and its implementation.
>
> (ii) Rectify the impact by repairing, rehabilitating or restoring the impacted environment.
>
> (iii) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.
>
> (iv) If the results listed in subparagraphs (i)-(iii) of this definition cannot be achieved, compensate for the impact by replacing or providing substitute resources or environments.

25 Pa. Code § 105.1. The Board determined that the Mocks failed to satisfy factor (i) of the mitigation requirements in that they failed to consider options to minimize or eliminate the impact on the wetlands, 1992 EHB at 558, and that they also failed to satisfy factor (iv) because their proposal for replacement wetlands was inadequate in both size and quality to compensate for the wetlands that would be lost. 1992 EHB at 559.

The Board concluded that the Mocks had not met their burden of proof and that, given the failure to mitigate the serious environmental harm posed by the project, the Department was correct in denying the permit.

The Mocks appealed to the Commonwealth Court. On appeal, the Mocks conceded the correctness of the regulatory permitting decision and contested only that portion of the Board's adjudication which held that the denial did not constitute a taking. In appealing to the Commonwealth Court, the Mocks relied solely

on this Court's decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992), a decision which was published after the issuance of the Board's adjudication, but prior to the filing of appeal in the Commonwealth Court.

Commonwealth Court found that the facts in this case did not justify the Mocks' reliance on *Lucas*, and that the Board correctly found that the Department's denial of the permit application, when considered under the principles of traditional takings analysis, did not result in a taking. *Mock v. Commonwealth, DER*, 154 Pa. Commw. 380, 623 A.2d 940 (1993). The Pennsylvania Supreme Court granted review of Commonwealth Court's decision and, on November 22, 1995, issued a *per curiam* order affirming the lower court's order.

SUMMARY OF ARGUMENT

In the Petition for a Writ of Certiorari, the Mocks assert that the decision of the Pennsylvania Supreme Court presents four questions which should be reviewed by this Court. Two of the questions were never presented to the Pennsylvania courts; this Court therefore lacks jurisdiction to review these questions. The remaining two questions rest on an assumption that is not supported by the record below. Petitioners assume that they have successfully proven that the denial of the permit at issue rendered their property valueless but the facts established below contradict this assumption. Therefore, the Pennsylvania courts correctly concluded that the facts in this case did not justify the application of the categorical rule of *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992).

No compelling reasons exist to grant the Writ of Certiorari. The Pennsylvania courts did not decide the case in a way that conflicts with the decisions of this Court, or of another state court of last resort, or of a United States Court of Appeals. The Pennsylvania courts correctly stated this Court's analysis in *Lucas*, and correctly applied the analysis to the factual findings of record to find no taking under *Lucas*. The courts then followed

settled principles of traditional takings analysis, as articulated by this Court, to conclude that no taking occurred.

ARGUMENT

I. PETITIONERS ATTEMPT TO SEEK REVIEW FROM THIS COURT OF QUESTIONS WHICH WERE NEVER PRESENTED TO THE PENNSYLVANIA COURTS

Petitioners ask this Court to consider questions that were never presented to the Pennsylvania courts, specifically, of the questions presented by appellants, questions 1 and 4:

> 1. Is categorical treatment of regulatory action which denies all economically beneficial or productive use of land appropriate for "as applied" as well as facial takings challenges under the Fifth Amendment?
>
> 4. Are the landowners' investment-backed expectations to be considered in cases of categorical regulatory takings, and if so, were those expectations of petitioners frustrated by their inability to develop commercially zoned property because of wetlands restrictions enacted long after the property was purchased?

Petitioners' Petition for a Writ of Certiorari at i. Review of the questions presented to the Pennsylvania appellate courts, and the briefs filed in support of appellants' position, shows no evidence that these questions were raised or argued to the state courts at any level.[4] The questions have emerged in the Petition for Certiorari

---

[4] The issue of reasonable investment-backed expectations and its relationship to the *Lucas* analysis was discussed briefly by petitioners in their brief to the Commonwealth Court, but there they argued that *Lucas* does not permit the analysis of investment-

for the first time, thus asking this Court to "review" questions which the Pennsylvania courts never had the opportunity to consider.

Petitioners ignore the requirements of the Court expressed in Supreme Court Rule 14. That rule specifies the contents for a Petition for a Writ of Certiorari and provides that, when review of a state-court judgment is sought, a petitioner must show that the federal question was timely and properly raised thereby establishing the Court's jurisdiction to review the judgment on granting of the writ. Petitioners must specify in the statement of the case, with specific references to the record, when and how in the state proceedings the federal questions sought to be reviewed were raised and the way in which they were passed on by the state courts. Sup. Ct. R. 14.1.(g)(i).

The Mocks' petition shows no evidence of compliance with Rule 14 with respect to any of the issues raised. With respect to issues 1 and 4, quoted above, such compliance would be impossible given that the Mocks never previously articulated these issues. The attempt to raise such issues at this level violates fundamental principles of appellate review and deprives the Court of jurisdiction to hear the issues.

II. THE FACTS ESTABLISHED IN THIS CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONERS

Petitioners base their statement of the questions presented, their statement of the facts, and their arguments on two assumptions: (1) that they successfully established that the permit

---

backed expectations undertaken by the Environmental Hearing Board in its adjudication. Commonwealth Court Brief for Appellants at 14. The Commonwealth Court did not address this argument and the Mocks did not raise it to the Pennsylvania Supreme Court.

denial rendered their property valueless, and (2) that the record below establishes that no permit could issue for the site under any circumstance. The facts established below contradict both assumptions.

A. THE PERMIT DENIAL DID NOT RENDER THE PROPERTY VALUELESS

In arguing that the permit denial rendered their property valueless, petitioners rely heavily on the Environmental Hearing Board's finding that "The site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless". *Mock v. Commonwealth, DER*, 1992 EHB 537, 548. Petitioners' assumption and the Board's conclusion are not, however, one and the same, as petitioners attempt to lend meaning and weight to the Board's limited statement that it cannot support.

The Board was simply stating its factual conclusion that the property, if not permitted, and if not developed, held essentially no value. Petitioners, in their arguments, conclude that this statement is equivalent to a finding that this specific permit denial rendered the property valueless. The leap of logic that underlies this broadening of the Board's conclusion is that this permit denial amounted to a complete bar to permitting and development of the property. This logic must fail, because the record clearly establishes that the Mocks had not exhausted the possibilities for permittable development of the site.

In considering the record on this point, the import of the Mocks' concession that the permitting denial was appropriate should be considered. The Department's denial of the permit was based, in part, on the conclusion that the Mocks had not adequately avoided or minimized the environmental harm threatened by the project. The Board found the Department's conclusion to be justified because the Mocks had not considered reducing the size of the project or changing its proposed use. In addition, the Board found that the Mocks' mitigation offer, of only 0.38 acres to replace the 0.87 acres that would be totally destroyed

by the project, was inadequate. The Board found that the Mocks had totally overlooked the possibility that the proposed facility could be reduced in size, thus lessening the environmental impact, and that the Mocks had overlooked as well the possibility that additional mitigation could be provided through construction of off-site replacement wetlands.

The Board reached all of these conclusions in upholding the permit denial. The Mocks conceded on appeal that the permitting denial was appropriate and did not contest the Board's holdings on the permit denial. It is clear from the Board's analysis of the permit denial that possibilities remained for permittable development in the wetlands portion of the property, that the Mocks had not exhausted those possibilities as a means of minimizing the net loss of wetlands area, and that the permit denial on this ground was justified. The petitioners are now bound by these conclusions and cannot collaterally challenge them. They cannot, on the one hand, agree to the correctness of the permitting denial and the reasons for it, and then, on the other hand, argue the invalidity of those same conclusions to support their takings analysis.

Although the Environmental Hearing Board did not have the benefit of the Court's *Lucas* analysis, the Board did consider economic impact and concluded that the Mocks had not demonstrated that their investment-backed expectations had been destroyed. 1992 EHB at 557. Petitioners ignore this important finding by the Board and fail to deal with the implications of it. This finding makes clear that the Board did not conclude that the permit denial rendered the property valueless.

B. PETITIONERS ARE NOT PRECLUDED FROM DEVELOPING THE PROPERTY

Petitioners are also incorrect in asserting that the record establishes that a permit could not issue for the site under any circumstances. To the contrary, the record establishes that

the Department would have been likely to agree to the permitting necessary to allow development in the uplands. Commonwealth Court summarized the state of the record on this point:

> The Mocks ... argue that the department never guaranteed that it would approve a permit to fill wetlands for an access road to reach the garage if it was moved to the uplands corner, or for any other purpose, but the record does not support this contention. Because the Mocks never submitted alternative proposals to the department, the department could only respond to questions about hypothetical situations. However, when questioned about the possibility of granting a permit to fill wetlands for an access road to reach the southeast uplands corner, Richard Shannon, a water pollution biologist for the department, testified, "I feel that a driveway construction on this property would be feasible because the impact would be minimal.

623 A.2d at 947. In arguing that any new permit application would have been futile, petitioners totally ignore both this testimony and the Commonwealth Court's analysis of it.

Given the various possibilities that remained for permittable development of the site, it can scarcely be said that no permitting or development could occur, and therefore that the site must remain valueless. In this case, it is not the permit denial that has rendered the property valueless, but rather, as found by the Department, the Environmental Hearing Board, and the Pennsylvania appellate courts, the Mocks' failure to explore other options for the site.

In summary, petitioners' statement that the permit denial has rendered the property valueless is based on a misstatement of the Environmental Hearing Board's factual conclusions and is not supported by the facts in the record. Many of the arguments

raised in support of the petition rely on this flawed assumption and the facts then do not support these arguments. More fundamentally, the facts do not give rise to questions 2 and 3 of the questions presented, as those questions rely on the assumption that the Mocks successfully established that the permit denial rendered the property valueless. These questions, therefore, have not been properly raised to this Court.

III. THE PENNSYLVANIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

The Pennsylvania courts, in reaching the conclusion that the Department's denial of the Mocks' application for a permit did not result in a taking, acted consistently with this Court's decision in *Lucas v. South Carolina Coastal Council*, 508 U.S. 1003, 112 S.Ct. 2886 (1992). The analysis of *Lucas* is contained in the opinion of the Commonwealth Court, an opinion which was upheld by the Pennsylvania Supreme Court's *per curiam* affirmance.

Petitioners seriously mischaracterize the Commonwealth Court's opinion in arguing to this Court that

> the Court considered *Lucas* and declined to apply its constitutional standard for determining whether the permit denial was a regulatory taking, despite finding substantial evidence to support the EHB's conclusion that the property was valueless in its present condition.

Petition for a Writ of Certiorari at 8. Consideration of the Commonwealth Court's opinion shows that the Court properly stated the principles of *Lucas* and then appropriately applied those principles to the facts of record.

A. COMMONWEALTH COURT CAREFULLY FOLLOWED THIS COURT'S ANALYSIS IN *LUCAS*

Commonwealth Court's analysis of *Lucas* begins with an explanation of the factual setting for the case, then explains the Court's standard for categorical treatment of takings claims, noting that two categories of regulatory actions are compensable without the typical case-by-case, fact-specific analysis which attends a typical takings case. In addition to physical invasion, *Lucas* made clear that categorical treatment was appropriate "where regulation denies all economically beneficial or productive use of land." 623 A.2d at 945, citing *Lucas* at ____, 112 S.Ct. at 2893. Commonwealth Court then recognized that, where a categorical taking has been found, the government must compensate the landowner unless state law would have imposed such a restriction at the time of acquisition of the property. 623 A.2d at 946.

Petitioners do not really argue that the Pennsylvania courts failed to properly state the principles of *Lucas*, but rather that the courts failed to properly apply *Lucas*' categorical takings standard.[5] Petitioners offer several arguments in support of their contention that the courts below did not properly apply the *Lucas* standard.

B. PETITIONERS MISINTERPRET THE ENVIRONMENTAL HEARING BOARD'S FINDING

First, petitioners argue that the courts failed to give proper weight to the Environmental Hearing Board's finding regarding the land's value as undeveloped, unpermitted property. As discussed above, this contention improperly interprets the Board's limited

---

[5] This Court's rules provide that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. S.Ct. Rule 10.

factual conclusion. Commonwealth Court placed this finding in the proper perspective:

> The import of the Board's finding, that the land in its current state is valueless, is simply to state that the Mocks' undeveloped property at present is without economic value. That finding does not mean that the Mocks' property must remain undeveloped and devoid of value in the future because of the department's environmental regulations.

623 A.2d at 946.

Commonwealth Court agreed with the Environmental Hearing Board's statement that the Department's action was only "to deny permission for Appellants [the Mocks] to proceed with a specific project design. It does not go beyond that point." *Id.* at 947. The court agreed that possibilities for permittable development of the site remained, and that the property was not devoid of all value. The court therefore found that the categorical rule of *Lucas* was not applicable to the facts of record in this case. This conclusion is wholly consistent with this Court's analysis in *Lucas*. It is only by twisting the meaning of the Environmental Hearing Board's finding that petitioners can attempt to argue otherwise.

C. THE BURDEN OF PROOF WAS PROPERLY ASSIGNED AND THE MOCKS FAILED TO MEET THAT BURDEN

Petitioners also argue that the Pennsylvania courts attempted to avoid a proper application of *Lucas'* categorical rule by imposing an improper burden of proof on the Mocks: "an uncertain and potentially interminable burden of excluding all economically viable use in the permit application process." Petition for a Writ of Certiorari at 12. Petitioners assert that the Pennsylvania courts would require them to submit endless

alternative proposals even though they established that further submissions would be futile. The record belies these assertions.

Petitioners' assertion that the Department "acknowledged that no alternate plan would be acceptable," Petition for a Writ of Certiorari at 12, is flatly contradicted by the record. Although the Mocks never submitted any alternative plans for development in the uplands, the Department testified at hearing that such development would very likely have been permitted had the application been submitted. While petitioners completely ignore this testimony, Commonwealth Court properly noted its significance. 623 A.2d at 947.

The Mocks also never addressed the Department's concerns for development in the wetlands by either scaling down or changing the project, or increasing their offer for replacement wetlands. The Mocks never answered the Department's requests for less environmentally damaging proposals, nor did they produce credible evidence, either in the permit application process, or at hearing, that there were no alternatives less damaging to the wetlands. The only testimony on this point was from the Mocks' consultant, Russell Benner, and the Board rejected this testimony as incredible, given the size and scope of the project. 1992 EHB at 550.

The Mocks concede that the permit was correctly denied for failure to explore less environmentally damaging alternatives, yet then decry the courts' finding that because unexplored possibilities for permittable development of the site still exist, it cannot be said that the regulatory scheme has stripped the property of all value. Far from insisting on endless numbers of submissions, the Pennsylvania courts simply said that the failure of this one submission could not establish a taking, given the facts established on the record below.

Petitioners also argue that the Court should extend the reasoning on burden of proof issues expressed in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct 2309 (1994), to this case. The

facts in this case are far removed from those in *Dolan*, and provide no basis for a similar analysis on burden of proof.

In *Dolan*, the municipality conditioned the grant of a permit on a requirement that the landowner dedicate a portion of her property for a public greenway and for a pedestrian/bicycle pathway. Under these facts, the Court found it proper to impose the burden of proof on the municipality to demonstrate that the regulatory restriction was related in nature and extent to the impact of the proposed development. The Court distinguished this case from other land use regulation cases on two bases: first there was a single adjudicative decision rather than a general legislative determination, and, second, "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." ___ U.S. at ___, 114 S.Ct. at 2316. Neither basis of distinction applies to the instant case.

The Court specifically noted the general rule that the burden properly rests on the party asserting the taking ___ U.S. at ____, n.8, 114 S.Ct. at 2320, n.8. The facts in this case are not analogous to those in *Dolan*, and petitioners' argument seeks a reallocation of the burden of proof that is, in fact, inconsistent with *Dolan* and with the Court's prior decisions discussing this issue.

Petitioners' arguments regarding the burden of proof and production rest on the conclusion that they established that further applications would be futile.[6] The conclusion is erroneous and

---

[6] Petitioners also argue that the Environmental Hearing Board imposed a standard of proof that is inconsistent with the decision of the U.S. Court of Claims in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *aff'd* 28 F.3d 1171 (Fed. Cir. 1994). The Court of Claims' view on burden of proof, as expressed in *Loveladies*, is not a view that has been adopted by this Court, nor did the Court of Appeals for the Federal Circuit

the argument, therefore, is insupportable. In *Lucas*, this Court specifically recognized that the burden of proof remains on the landowner to show that the regulatory action has denied all economically beneficial use of the land. 508 U.S at ___, n.6, 112 S.Ct. at 2893, n.6. The burden in the proceedings below was properly allocated and the Mocks did not meet that burden.

IV. THE DECISIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Petitioners suggest that the decisions below in this case are inconsistent in certain respects with decisions of the United States courts of appeal, specifically, two decisions of the Court of Appeals for the Federal Circuit: *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *vacating and remanding* 21 Cl. Ct. 161 (1990), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898 (1995), and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), *aff'g.* 21 Cl. Ct. 153 (1990). Contrary to petitioners' suggestions, however, the Pennsylvania courts' decisions are not in conflict with these opinions.

Petitioners argue that Pennsylvania insists that "the property owner exhaust all manner of impossibilities" rather than adhering to the Federal Circuit's requirement, expressed in *Florida Rock*, that the determination of deprivation of economically viable use of property "be guided by its market value, if any, after the permit denial." Petition for a Grant of Certiorari at 18.

This argument juxtaposes what are really two separate components of the takings analysis. The first issue is whether there has been a definitive determination of the effect of the

---

consider the Court of Claims' reasoning on this issue. In any event, this argument, like many of petitioners' arguments, rests on the flawed assumption that the Mocks established that further applications would be futile.

regulatory restriction on the property, and the second issue is the use of fair market value in analyzing economic viability.

As to the first issue, the courts below in this case said, in essence, that there had not been such a determination. Because there remain possibilities for permitted development of the site under the regulatory scheme, it cannot be said that there is no viable economic use for the property. The Pennsylvania courts have not insisted on "all manner of impossibilities", but, rather, that the effect of the regulatory restriction on the property be fully determined, given that the Mocks did not demonstrate that additional efforts to obtain a permit for the site would be futile. This outcome is consistent with this Court's analysis of the exhaustion issue. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561 (1986).

In *Florida Rock*, on the other hand, the Court of Claims initially determined that the only viable use of the property could not be permitted under the regulation. *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct 160 (1985), *rev'd.* 791 F.2d 893 (Fed. Cir. 1986). Based on this finding, the Court of Claims concluded that a taking had occurred, but, on appeal, the Federal Circuit ruled that the Court of Claims erred in this conclusion. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053, 107 S.Ct. 926 (1987). The error lay in the Court's assumption that "if there was, under the regulation, no allowable and practicable immediate use, this established a taking". 791 F.2d at 901. The Court of Claims had emphasized the denial of immediately viable use and failed to determine fair market value, a determination which the federal Circuit said must include consideration of the landowner's ability to recoup its investment. 791 F.2d at 905.

As to petitioners' argument on the application of the fair market value standard of *Florida Rock*, there are flaws in the reasoning. First, petitioners are not in the same position as the property holders in *Florida Rock*, given that permittable uses for the property remain. Second, even if there were no permittable

uses, petitioners ask this Court to focus on precisely what the Federal Circuit cautioned against--that is, the immediately viable use of the property. Petitioners do so by asking the Court to rely on the Environmental Hearing Board's finding concerning the value of the property at present, undeveloped and without a permit. Finally, even assuming that petitioners were in the position of the claimants in *Florida Rock*, the record below will not permit an examination of fair market value as defined by the Federal Circuit court, as the evidence to support this determination is totally lacking.

Petitioners make the following argument concerning *Loveladies*:

> In its adjudication of petitioners' takings claim, the EHB found that the property, without a permit to fill in a portion of the wetlands, was essentially valueless, and noted that with such a permit, the site could have a value of $175,000 -- the amount offered by Midas -- or greater. But contrary to the Federal Court's opinion in *Loveladies' Harbor*, the Pennsylvania courts made a radical retreat from *Lucas* and held that this was not enough for a regulatory taking.

Petition for a Writ of Certiorari at 11.

Here again, petitioners are not in the same position as the claimants in the cited case. In *Loveladies*, it was established in the Court of Claims that any modified or less ambitious proposals would have been futile; there was no suggestion that subsequent permit applications would be successful. In petitioners' case, the opposite is true. The problems that afflict petitioners' argument on *Florida Rock* are equally fatal to their argument on *Loveladies*. Petitioners' arguments that the Court should resolve inconsistencies between the Pennsylvania courts' decisions below and the decisions of the Federal Circuit Court of Appeals are unjustified based on the record below.

V. NO COMPELLING REASONS EXIST TO JUSTIFY A GRANT OF REVIEW ON CERTIORARI

A petition for a writ of certiorari will be granted only for compelling reasons. S.Ct Rule 10. This petition presents no such grounds. The Pennsylvania courts decided the case below in a manner consistent with the rulings of this Court and of the United States courts of appeals. There is no assertion in the petition that the rulings conflicted with the decision of any other state court of last resort. While petitioners assert that the case "begs for guidance" on the issue of economic impact, Petition for Writ of Certiorari at 18, the Pennsylvania courts correctly analyzed the facts in the case by utilizing this Court's discussions on consideration of economic impact.

The case presents no novel issues or unprecedented legal conclusions by the Pennsylvania courts. The dispute is, at heart, a factual one--is the property devoid of economic value as a result of the regulatory restriction? The Environmental Hearing Board said no to this question, and the Pennsylvania appellate courts agreed. Petitioners ask this Court to reexamine that answer and try to couch the effort to reexamine factual findings in legal theories, some newly raised, and some based on erroneous factual conclusions.

Petitioners rest the great weight of their arguments on the Board's factual conclusion that the property is essentially valueless without a permit. Petitioners' position is an extreme one, that is, that the only proper reading of *Lucas* is one that concludes that the Environmental Hearing Board's finding categorically entitles them to compensation. Petition for a Writ of Certiorari at 11. To accept this argument, the Court must accept a theory that, if applied, would greatly expand the number of compensable takings effected by the regulatory process.

Under petitioners' theory, landowners need only submit one permit application for the most commercially profitable use of the land and, if that permit application is denied, and the land at

the time of the denial is then valueless, the landowner would be entitled to compensation even though other permittable uses of the property remain unexplored. This Court envisioned that the situation that called for application of *Lucas*' categorical rule would be "extraordinary", 508 U.S at ___, 112 S.Ct. at 2894. But under petitioners' expansive reading of *Lucas*, application of the rule would be commonplace and far from the rare event envisioned by the Court.

All takings analysis is an exercise in balancing; the government's need to regulate property use in the public interest is weighed against the protection of personal property rights. Petitioners' arguments are an attempt to tip that balance in favor of private property interests. This Court recognized long ago that

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159 (1922). That observation is particularly relevant to an analysis of this case.

CONCLUSION

For all of the foregoing reasons, the Commonwealth of Pennsylvania, Department of Environmental Protection, respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Office of General Counsel
Commonwealth of Pennsylvania
225 Main Capitol
Harrisburg, PA 17120
(717)787-2551

DENNIS W. STRAIN
MARTHA E. BLASBERG
Office of Chief Counsel
Department of Environmental Protection
P.O. Box 8464
Harrisburg, PA 17105-8464
(717)787-7060

Counsel for the Commonwealth of Pennsylvania, Department of Environmental Protection, Respondent

MOTION FILED

APR 22 1996

(3)

No. 95-1329

In the

Supreme Court of the United States

October Term, 1995

CONRAD MOCK and BARBARA MOCK,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, CONRAD MOCK AND BARBARA MOCK

* JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorney for Amicus Curiae
Pacific Legal Foundation

27pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, CONRAD MOCK AND BARBARA MOCK 1

IDENTITY AND INTEREST OF AMICUS CURIAE 2

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 4

INTEREST OF AMICUS CURIAE 4

OPINION BELOW 4

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE PENNSYLVANIA COURT ERRS BY MISCONSTRUING THE REQUIREMENT THAT A CLAIM BE RIPE BEFORE THERE CAN BE A TAKING 7

A. On the Record of This Case, It Is Clear That the State Would Not Grant a Permit Enabling the Mocks to Make Reasonable Economic Use of Their Property 8

Page

B. The Pennsylvania Court's Decision Is in Conflict with Other Circuits That Have Adopted a Futility Limitation to the Requirements of Exhaustion and Ripeness . . 9

C. The Decision of the Pennsylvania Court Does Not Follow from This Court's Precedents Regarding Ripeness 14

D. The Pennsylvania Court's Insistence That the Mocks Apply for Additional Permits Conflicts with This Court's Pronouncement That Government Has the Burden of Proof in Certain Takings Cases 15

II. THERE IS NO "RIPARIAN LAND" EXCEPTION TO THE TAKINGS DOCTRINE 16

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

CASES

Azul Pacifico, Inc. v. City of Los Angeles,
948 F.2d 575 (9th Cir. 1991), on reconsideration,
973 F.2d 704 (9th Cir. 1992), cert. denied,
___ U.S. ___, 113 S. Ct. 1049 (1993) 13

Chicago, Burlington & Quincy Railroad Co. v.
City of Chicago, 166 U.S. 226 (1897) 19

Dolan v. City of Tigard, 512 U.S. ___,
114 S. Ct. 2309 (1994) 15

Eide v. Sarasota County, 908 F.2d 716 (1990) 13

First English Evangelical Lutheran Church of
Glendale v. County of Los Angeles,
482 U.S. 304 (1987) 2

Florida Rock v. United States, 21 Cl. Ct. 161 (1990),
rev'd on other grounds, 18 F.3d 1560 (Fed. Cir. 1994),
cert. denied, ___ U.S. ___, 115 S. Ct. 898 (1995) . . . 3,9-10

Florida Rock v. United States, 791 F.2d 893 (Fed. Cir.),
cert. denied, 479 U.S. 1053 (1986) 10

Formanek v. United States, 26 Cl. Ct. 332 (1992) 6

Greenbriar v. City of Alabaster, 881 F.2d 1570
(11th Cir.), reh'g denied,
893 F.2d 346 (11th Cir. 1989) 13

Herrington v. County of Sonoma, 834 F.2d 1488
(9th Cir.), modified at 857 F.2d 567 (1988) 11-12

Page

Hodel v. Irving, 481 U.S. 704 (1987) 2

Hoehne v. City of San Benito, 870 F.2d. 529
(9th Cir. 1989) 12

Hughes v. State of Washington, 389 U.S. 290 (1967) 19

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 17-18

Keystone Bituminous Coal Association v.
DeBenedictis, 480 U.S. 470 (1987) 2

Kinzli v. City of Santa Cruz, 818 F.2d 1449
(9th Cir.), amended at 830 F.2d 968 (1987),
cert. denied, 484 U.S. 1043 (1988) 12

Loveladies Harbor v. United States,
15 Cl. Ct. 381 (1988) 10

Loveladies Harbor v. United States,
21 Cl. Ct. 153, aff'd,
28 F.3d 1171 (Fed. Cir. 1994) 2,6,10-11,18

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S. Ct. 2886 (1992) 2,9,16-17,19

Lucas v. South Carolina Coastal Council,
424 S.E.2d 484 (S.C. 1992) 16

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 14

McDougal v. County of Imperial, 942 F.2d 668
(9th Cir. 1991) 18

Page

Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii, 903 P.2d 1246 (Haw. 1995), petition for certiorari pending, 64 U.S.L.W. 30 d 96 19

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2,17

Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994) 13

Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951 (9th Cir. 1991), vacated on other grounds, ___ U.S. ___, 113 S. Ct. 31 (1992) 12

Stevens v. City of Cannon Beach, 854 P.2d 449 (1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1332 (1994) 18

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991) 11

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 14

Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988) 12

RULES

Supreme Court Rule No. 37 1

Page

UNITED STATES CONSTITUTION

Fifth Amendment 2

Fourteenth Amendment 2

MISCELLANEOUS

Michael Berger, The Ripeness Mess in Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers, 1991 Institute on Planning, Zoning, and Eminent Domain, Ch. 7 (Sw. Legal Found. 1991) 15

John E. Fee, Comment, Unearthing the Denominator in Regulatory Takings Claims, 61 UNIV. of CHICAGO L. REV. 1534 (1994) 9

Timothy Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 CALIFORNIA WESTERN L. REV. 1 (1992) 15

No. 95-1329

In the

Supreme Court of the United States

October Term, 1995

CONRAD MOCK and BARBARA MOCK,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, CONRAD MOCK AND BARBARA MOCK

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of petitioners, Conrad Mock and Barbara Mock. Consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, Commonwealth of Pennsylvania Department of

Environmental Resources has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the Nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

PLF has also participated in numerous lower court cases involving the denial of permission to utilize property designated as a wetland. For example, PLF has participated as amicus curiae in *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (upholding $2.6 million damage award for wetlands takings);

and *Florida Rock v. United States*, 21 Cl. Ct. 161 (1990), *rev'd on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 898 (1995).

Amicus seeks here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property designated as wetlands will provide an additional viewpoint with respect to the constitutional issues presented. Specifically, PLF will demonstrate that the court's interpretation of a rigid application of principles of exhaustion and ripeness is not consistent with that of other jurisdictions. PLF will also show that the court below errs in attempting to find a riparian exception to the established principles of property rights and takings.

DATED: April 19, 1996.

Respectfully submitted,

* JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
JAMES S. BURLING

Attorneys for Amicus Curiae
Pacific Legal Foundation

No. 95-1329

In the

Supreme Court of the United States

October Term, 1995

CONRAD MOCK AND BARBARA MOCK,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The order of the Supreme Court of Pennsylvania, affirming the order of the Commonwealth Court of Pennsylvania, is reported at 667 A.2d 212 (Penn. 1995), and is reproduced as Appendix A attached to the Mocks' Petition

for Writ of Certiorari. The Commonwealth Court decision is reproduced in Petitioners' Appendix C and the Environmental Hearing Board (EHB) Adjudication at Appendix E.

STATEMENT OF THE CASE

Conrad and Barbara Mock made the mistake in 1963 of investing in a 5.2 acre parcel of undeveloped land. Little did they know that the presence of wetlands on the property would prevent them from developing it in a manner similar to several highly developed surrounding properties. *See* Petitioners' Statement of the Case at 3, EHB Adjudication, Appendix E at 34a. They also did not guess that the nature of their property as *riparian* land would be used by the Pennsylvania EHB to help justify its denial of compensation for a regulatory taking. Yet that circumstance, along with the fact that they did not spell out their investment plans in 1963, is what led the EHB to decide that the Mocks were not entitled to relief when their permit was denied:

> The board was persuaded that the Mock's investment-backed expectations were not destroyed, because they never introduced evidence of what their expectations were when they purchased the property in 1963 or afterwards, and because riparian land has been "the subject of regulation for centuries."

Opinion of the Commonwealth Court of Pennsylvania filed March 25, 1993 (Opinion), reproduced in Petitioners' Appendix C at 13a. The Mocks appealed the Environmental Review Board's adverse decision to the Commonwealth Court of Pennsylvania, which upheld the board's decision on several significant grounds. There was one dissent. *See* Petitioners' Appendix D. The majority found first that although the property is valueless in its present undeveloped state, it *might* obtain some value if it were developed. Opinion at 17a to 18a. Petitioners object to this conjecture

because the uses suggested by the court, which included a hospital or retail shop, were unrealistic in view of the board's intent to deny ***all*** projects requiring significant filling of the wetland. *See* Petition at 5-7 (showing that so long as a suggested use could be located elsewhere in the community (on drier land) it would be denied on the Mocks' property).

Second, the court found that the regulation did not constitute a "physical invasion" of Mocks' property. Opinion at 21a. Third, the court found that the Mocks had not proven that their "reasonable investment backed expectations" had been interfered with because they had not shown what their plans were in 1963, because the land was riparian, and because it was within a floodplain. Opinion at 23a. Finally, the court rejected the reasoning of the Court of Federal Claims in two wetlands takings cases which had found that permit denials constituted a taking. Opinion at 24a (discussing *Formanek v. United States*, 26 Cl. Ct. 332 (1992), and *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994)).

The Pennsylvania Supreme Court summarily affirmed the Commonwealth court opinion without comment. *See* Petitioners' Appendix A.

SUMMARY OF ARGUMENT

The order of the Pennsylvania Supreme Court conflicts with established takings doctrine in several federal circuits. This brief will focus on two of those conflicts. The first key area of departure is the court's finding that the Mocks had not properly ripened their claim by not applying for permits to put the property to certain alternative uses. These alternatives are illusory and would be futile to pursue. Several federal circuits have adopted more meaningful tests for determining whether or not a claimant has adequately exhausted available administrative remedies in order to ripen a claim.

The second area of concern is the notion that because the subject land is "riparian" and in a floodplain, the owners, who bought the property in 1963, should have expected that any permit applications might be denied, and that they therefore had fewer reasonable investment-backed expectations to use the property, and thus a less viable takings claim. This reasoning serves to redefine the underlying property rights of the Mocks in a manner proscribed by this Court.

ARGUMENT

I

THE PENNSYLVANIA COURT ERRS BY MISCONSTRUING THE REQUIREMENT THAT A CLAIM BE RIPE BEFORE THERE CAN BE A TAKING

The Pennsylvania Court determined that the Mocks' claim for inverse condemnation had not ripened because there was a theoretical possibility that some sort of permit would have been granted which could have provided the Mocks with some economic return on their property. Finding that there was "no evidence in the record that the land cannot be put to economically viable use," Opinion at 22a, the court put the burden on the Mocks to prove a negative. Yet this requirement is contrary not only to the facts in this case, but is also in conflict with many courts which have considered how many times a property owner must go to a dry well before concluding that the well is dry.

A. On the Record of This Case, It Is Clear That the State Would Not Grant a Permit Enabling the Mocks to Make Reasonable Economic Use of Their Property

There can be little question that the well was dry in this instance. The Mocks explored alternatives suggested by the state, but found that these would either not make economic sense or would still require the filling of wetlands. EHB Adjudication, Petitioners' Appendix E at 43a-44a, Nos. 48, 49, 50, 51, 48a.

It is also clear from the record that any filling of the wetlands, for uses that were not "wetland-dependent" would have been denied. As petitioners note, the policy of the Department of Environmental Resources (DER) is to not grant a permit for filling a wetland when there are alternative sites in the community for the desired use--regardless of who owns the alternative site. *See* Petition for Certiorari at 7 (quoting testimony of Richard Shannon, DER, indicating that as long as any available alternative upland sites are available for a project, a wetland development permit will not be granted). *See also* EHB Adjudication, Appendix E at 47a-48a, concluding that the Mocks failed to adequately consider alternatives because they did not consider putting an auto repair shop elsewhere in the community. Reliance on the Mocks' failure to consider moving the repair shop, of course, begs the question of whether economically viable use of the *site* has been destroyed. Furthermore, there is nothing in the record suggesting that any sort of wetland-dependent use would have been feasible (or approved).

With respect to the Commonwealth Court's reliance on the EHB finding that because the Mocks "did not seek approval for a smaller facility, we cannot conclude that they will be denied ***any*** use of the facility," Opinion, Appendix C at 13a (emphasis added), it is misplaced. First, as noted, the record is clear that no economically feasible use will be

granted. Second, the emphasis on "any use" ignores the potential of, and has denied the Mocks' ability to prove, that neither economically beneficial nor productive use remains feasible or that there has been a complete taking of a portion of the property, *see Lucas v. California Coastal Council* 505 U.S. 1003, 112 S. Ct. 2886, 2894 n.7, or a partial taking of the whole property, *id.* at 2895 n.8; *see also* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims,* 61 UNIV. of CHICAGO L. REV. 1534 (1994).

Thus, despite claims from the state and the Pennsylvania court that the Mocks should have explored additional alternative uses and applications, it is clear that the Mocks ***did*** explore such alternatives and that they would have been denied in any event.

B. The Pennsylvania Court's Decision Is in Conflict with Other Circuits That Have Adopted a Futility Limitation to the Requirements of Exhaustion and Ripeness

The notion that a property owner must apply for permits when it is clear that no permits to put the property to any feasible use will be forthcoming conflicts with the holdings of the Court of Federal Claims, and the Ninth and Eleventh Circuits where landowners are *not* required to apply for permits that clearly would not be forthcoming. In other words, a property owner who is unlucky enough to have property taken by a regulatory agency *in Pennsylvania* will not be able to obtain relief nearly as readily, if at all, as a property owner in other parts of the country or in some federal courts.

There is a substantial conflict between the Pennsylvania courts and the Court of Federal Claims which has ruled *for* landowners in similar circumstances. For example, in *Florida Rock v. United States,* 21 Cl. Ct. 161 (1990), *rev'd on other grounds,* 18 F.3d 1560 (Fed. Cir. 1994), *cert.*

denied, ___ U.S. ___, 115 S. Ct. 898 (1995) (*Florida Rock* II), the trial court was confronted with a takings claim by a property owner who was denied a permit to use wetlands for limestone mining. In response to government arguments that the owner should have submitted alternative permits, the trial court found "'[i]t would serve no purpose to require claimant to exhaust administrative procedures before seeking judicial review when it is clear that resort to administrative action would be futile.'" *Id.* at 170 (quoting *Conant v. United States*, 12 Cl. Ct. 689, 692 (1987)). Or, as noted by the Federal Circuit in an earlier proceeding responding to the argument that the Corps of Engineers might grant Florida Rock a permit to mine 1,560 acres after denying a permit to mine 98 acres: "We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality." *Florida Rock v. United States*, 791 F.2d 893, 904 (Fed. Cir.), *cert. denied*, 479 U.S. 1053 (1986) (*Florida Rock* I).

Similarly, the trial court in *Loveladies Harbor v. United States*, 15 Cl. Ct. 381 (1988) (*Loveladies* I) (denying summary judgment for government in taking claim against government for failure to grant a wetlands permit); 21 Cl. Ct. 153 (1990) (*Loveladies* II) (awarding $2.6 million in takings damages); *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994), refused to require the applicant to pursue any additional permit applications once it became clear that the property could not be put to economic use. The trial court found that the plaintiff should not be forced to resort to "some endless series of requirements." *Loveladies* I, 15 Cl. Ct. at 386. The court also considered and promptly rejected suggestions (which were ridiculous in light of the property's location and proximity to residential development) from the Corps of Engineers that the property could be put to some other economically viable use, such as farming or hunting. *Loveladies* II, 21 Cl. Ct. at 158-59. On affirming the

decision, the Federal Circuit agreed that economically viable use had been denied on the facts of the case. 28 F.3d at 1182.

In *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991), the court rejected the proposition that the owner of a coal mine had to apply for permits which would have surely been denied under the law. As the *Whitney* case was ably summarized by the same court later in *Loveladies* II, "the regulatory enactment, the Surface Mining Control and Reclamation Act of 1977, had its intended effect, precluding the surface mining of plaintiff's coal field because of the overlying alluvial valley floor. This was based on extensive fact finding by the trial court regarding the purpose of the imposition, the nature of the property, its alternative uses, and the extent to which all or only a portion of plaintiff's property was so limited." *Loveladies* II, 28 F.3d at 1181. The appeals court in *Whitney Benefits* rejected arguments by the government that the plaintiff had to apply for additional permits. It noted that the coal mining statute at issue "expressly provides that 'no permit shall be approved' under conditions precisely descriptive of the Whitney coal estate.'" *Whitney Benefits*, 926 F.2d at 1171. The court concluded that an application would be "futile" and "absolutely foredoomed." *Id.* at 1172.

The Ninth Circuit has, on occasion, applied the futility exception to constitutional challenges to zoning decisions. In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir.), *modified* at 857 F.2d 567 (1988), the court, after first noting that it would apply the same ripeness considerations in due process and Equal Protection Clause challenges to zoning ordinances as this Court applied in the context of takings challenges, 857 F.2d at 569, held that it would be "inappropriate to require the Herrington's to have formally completed a hopeless application." 857 F.2d at 569. Instead the court adopted the "one meaningful application" rule,

meaning that a landowner cannot plead futility until he has filed at least one meaningful application. The court thus allowed the Herringtons to pursue a claim despite the fact that their permit had been rejected in the ***preliminary*** stage: "Under the circumstances of this case, it would be inappropriate to require the Herringtons to have formally completed a hopeless application." *Id.*[1]

Similarly, in *Hoehne v. City of San Benito,* 870 F.2d. 529, 534-35 (9th Cir. 1989), the court held that a landowner need not make an additional rezoning application when it was clear that it would be "futile." *But cf. Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *amended* at 830 F.2d 968 (1987), *cert. denied,* 484 U.S. 1043 (1988) (the court declined to apply the futility exception when an applicant had claimed that under the existing regulatory regime no application could possibly result in a marketable property. The court, while agreeing that the futility exception existed, thought it unwise to speculate on the "marketability" of an affected property without the benefit of a permit denial.). *See also Zilber v. Town of Moraga,* 692 F. Supp. 1195, 1199 (N.D. Cal. 1988) (finding that the Ninth Circuit's futility rule in *Kinzli* is "harsh and counterintuitive" but still controlling).

In the context of a takings challenge to a rent control regulation, the Ninth Circuit has on several occasions held that the ripeness doctrine does not require futile procedures. For example, in *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991), *vacated on other grounds*, ___ U.S. ___, 113 S. Ct. 31 (1992), the court

---

[1] The Ninth Circuit also did not require the Herringtons to apply for a variance: "Nevertheless ... application for a variance–need not be met in this case because pursuit of a variance was not a legally viable option." *Herrington*, 857 F.2d at 569-70.

found there was no need to pursue futile California state court remedies in a mobile home rent control takings case as a prerequisite for pursuing a federal claim. *Accord Azul Pacifico, Inc.* v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991), *on reconsideration*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1049 (1993).

The "one meaningful application" rule was also followed by the Eleventh Circuit in *Eide v. Sarasota County*, 908 F.2d 716, 726 n.17 (1990). The Eleventh Circuit has also noted that "[i]n most cases, no 'final decision' has been reached until an aggrieved landowner has applied for at least one variance to a contested zoning ordinance." *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11th Cir. 1994).[2] The Eleventh Circuit has also held that only one application need be made in an analagous substantive due process challenge where evidence showed that the only alternative to a rezoning was the existing zoning. The city failed to prove that any use other than the particular zoned use would be permitted. *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir.), reh'g denied, 893 F.2d 346 (11th Cir. 1989) ("The City has effectively conceded that the only alternative plan of development would have been under the existing zoning. As there is no uncertainty regarding the level of development that would be permitted ... [a] reapplication requirement serves no purpose here.")[3] Thus, the Eleventh Circuit's holding conflicts with the argument of the Pennsylvania Commonwealth court that the owner must prove a negative.

---

[2] The *Reahard* decision ultimately found that a *federal* takings case was not ripe for failure to exhaust *state* takings remedies.

[3] The court considered ripeness for a due process claim in the same analytical framework as for takings claims. *Id.* at 1573-74.

C. The Decision of the Pennsylvania Court Does Not Follow from This Court's Precedents Regarding Ripeness

Furthermore, the hypercritical application of the ripeness doctrine against the Mocks is not consistent with this Court's decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 (1986).

In *Hamilton Bank*, noting that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," 473 U.S. at 186, the Court found a takings claim not ripe because the applicant had not applied for a variance. In the case of the Mocks, the record is devoid of reference to any available variance procedures. And, as noted above, the alleged opportunity to apply for new permits is a chimera. In *MacDonald* this Court found a takings claim not ripe because there was "open the possibility that some development will be permitted." *MacDonald*, 472 U.S. at 352. However, the property in *MacDonald* was zoned for residential development and the state appellate court concluded that some significant development *could* be approved--but just not the particular 159-unit subdivision development applied for. *Id.* at 346-47.[4] No such possibility existed for the Mocks.[5]

---

[4] *MacDonald*, as noted by the dissent, was a close question because the developer's allegations that further applications would be futile. 477 U.S. at 390 (J. White, dissenting). However, the county asserted further applications might be granted. Here, the policies and testimony of the state agency make it clear that it would be futile to apply for any significant use of the riparian parcel.

D. The Pennsylvania Court's Insistence That the Mocks Apply for Additional Permits Conflicts with This Court's Pronouncement That Government Has the Burden of Proof in Certain Takings Cases

It was conceded by the court that Mocks had proven that their permit application had been denied and that the value of the property without a permit would be zero. Opinion at 22a. But the court continues to place the burden of proof on the Mocks to prove that no other permit would be granted. Placing of the burden on the Mocks ignores this Court's holdings on the burden of proof in takings cases.

In the context of a regulatory taking, once a claimant has made at least a prima facie case that the individual application of a land use restriction takes property, then the burden of proof should shift to the government to prove that its regulatory action, as applied to an individual landowner in an adjudicative decision, does not constitute a taking. *In Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309, 2320 n.8 (1994), this Court found that Mrs. Dolan's case was not a challenge to a generally applicable zoning ordinance (where a landowner has the burden of proving that the legislative act arbitrarily regulates property rights). Instead, it dealt with a government regulation of property applied in an "adjudicative decision" on an individual building permit condition. There the burden shifts to the government to prove that there has been no taking. *Id.*

---

[5] For two illuminating discussions of the doctrinal and practical difficulties presented by overzealous adherence to ripeness rules in the context of takings claims, *see Timothy Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CALIFORNIA WESTERN L. REV. 1 (1992); and Michael Berger, *The Ripeness Mess in Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 Institute on Planning, Zoning, and Eminent Domain, Ch. 7 (Sw. Legal Found. 1991).

Here, the Mocks have had their land use application denied leaving the property without value. For all practical purposes, any use of their property has been conditioned on the Mocks' willingness to forego touching all but a tiny fraction of the land that is not accessible or commercially useful. Adjudication, Appendix E at 43a-44a, Paragraph 50. The Mocks have made a prima facie case that their land has been taken. The burden is now on the government to prove otherwise, not on the Mocks to engage in a process of endless applications to prove again and again that no permit would ever be issued.

II

THERE IS NO "RIPARIAN LAND" EXCEPTION TO THE TAKINGS DOCTRINE

In *Lucas,* the State of South Carolina argued that David Lucas had no right to build on his land because it was beachfront property where all building was a nuisance-like activity. This Court doubted that assertion was correct and remanded the case for a determination of whether building a beachfront home was a nuisance in South Carolina. 112 S. Ct. at 2901-02. On remand, the South Carolina Court found that there was no such nuisance. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

Like David Lucas, the Mocks have never disputed that they are subject to reasonable regulations. However, the Pennsylvania court carved out a special rule for owners of riparian land, alleging that they should expect to be so highly regulated that they necessarily lack (unless they are able to prove otherwise) "reasonable investment backed expectations" to develop their land. Thus, the court recited EHB's finding that the Mocks' "investment-backed expectations were not destroyed, because they never introduced evidence as to what their expectations were ... because riparian land has been 'the subject to regulation for centuries.'" Opinion

at Appendix C, 13a. And later in its opinion the court proceeded to find that

> [a]s to the Mocks' future plans, we further agree with the board that the Mocks could not reasonably expect to develop their land free from government regulation because it is riparian land which has been subject to regulation for centuries.

Opinion at 23a. This statement undercuts the principle that the landowners can expect to put their property to economically viable use. *See Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2 (there is a ***right*** to build on property). More significantly, however, the Court is carving out an exception to the takings doctrine by claiming that it can ***never*** be assumed that owners of riparian or floodplain land can have reasonable investment-backed expectations to use their land.[6]

To be sure, owners of riparian property may be subject to greater regulation than others. *Lucas*, 112 S. Ct. at 2900. However, this fact has never been seen to countenance a denial of economically viable use of property, especially when the use is consistent with preexisting uses of neighboring riparian properties and when the government is not using the riparian lands for the purpose of accessing navigable waters--which is the limiting parameter for the navigational servitude exception for riparian land. *See Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). Indeed, in *Kaiser Aetna* the Court found the riparian land exception did not apply:

---

[6] The Pennsylvania Court, Opinion at 13a, cites to *White v. Pennsylvania Railroad Co.*, 47 A.2d 200 (1946), for the proposition that riparian land has been "subject to regulation for centuries." But *White* dealt with a landowner blocking a natural watercourse, damaging neighboring land. It was not a takings case. Neither it nor any other cited case stands for the proposition that landowners in Pennsylvania may not develop riparian land.

> Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Kaiser Aetna, 444 U.S. at 178. Similarly, in *Loveladies Harbor*, the federal circuit was unimpressed by arguments that the existence of modern wetlands regulations trumps an owner's investment-backed expectations for previously acquired property: "It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect." *Loveladies Harbor* II, 28 F.3d at 1183. Similiarly, the Mocks purchased their property in 1963, long before today's heightened awareness and regulation of wetlands. *Kaiser Aetna* and *Loveladies* are both clearly at odds with that of the Pennsylvania court.[7]

Indeed, by discovering a newly expanded riparian land exception to the takings doctrine, the court is following a growing trend to redefine property rights in order to minimize the potential of a governmental taking. *See, e.g., Stevens v. City of Cannon Beach*, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1332 (1994) (dissent by Scalia, J., expressing concern over the extension of the "public trust doctrine" to what had previously been

---

[7] In contrast to the Pennsylvania court's emphasis on the Mocks' land being in a floodplain, the Ninth Circuit has held that the fact that land is in a floodway does not by itself defeat a takings claim. "[Allegations that] the County, for illegitimate reasons, has deprived the McDougals of all economically viable uses of their property in designating it a floodway and in denying their application for a conditional use permit for retaliatory reasons ... state a claim for compensation for a regulatory taking." *McDougal v. County of Imperial*, 942 F.2d 668, 680 (9th Cir. 1991).

considered private property); *Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 903 P.2d 1246 (Haw. 1995), petition for certiorari pending, 64 U.S.L.W. 30 d 96 (extending "custom" of "gathering rights" to all persons with native Hawaiian blood and expanding that custom to allow native Hawaiians to restrict land development).

The notion that property rights can be defined anew, however, flies in the face of this Court's warning in *Lucas v. South Carolina Coastal Council*, "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 112 S. Ct. at 2892. Similarly, in *Hughes v. State of Washington*, 389 U.S. 290 (1967), Justice Stewart warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." 389 U.S. at 296-97 (Stewart, J., concurring.) *See also Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-34 (1897) (potential of a "judicial takings" mentioned).

The Pennsylvania courts must be restrained from creating an expansive new riparian or floodplain land exception to the takings doctrine.

CONCLUSION

Property ownership carries with it certain rights, such as the right to make reasonable and beneficial use of land. Property owners should not be subjected to an endless series of circus hoops before they can hope to exercise that right or present a claim for relief after use of the property is denied by the governmental body. Actions by state courts that redefine property rights to benefit the public at the expense

of individual landowners must be closely monitored by this Court.

For these reasons, it is appropriate and timely that this Court grant certiorari in order to provide the needed consistency and guidance to the lower courts.

DATED: April, 1996.

Respectfully submitted,

* JAMES S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae
Pacific Legal Foundation

MOTION FILED

APR 22 1996

(4)

No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CONRAD MOCK and BARBARA MOCK
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION, FAIRNESS TO LAND OWNERS COMMITTEE, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE PETITIONERS

Daniel J. Popeo
Paul D. Kamenar
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: April 22, 1996

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 202 223-1220

2F PP

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1329

CONRAD MOCK and BARBARA MOCK,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION, FAIRNESS TO LAND OWNERS COMMITTEE, PENNSYLVANIA LANDOWNERS ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF), *et al.*, respectfully move for leave to file the attached brief as amici curiae in

support of the Petition for Writ of Certiorari. Counsel for petitioners has consented to the filing of this brief; counsel for respondent has refused to consent, thereby necessitating the filing of this motion.

WLF is a national nonprofit public interest law and policy center with supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of restrictions imposed by regulatory authorities at the local, state, and federal level that either bar or impose conditions on the reasonable use and development of their property that implicate the Takings Clause of the Fifth Amendment of the U.S. Consitution.

WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Indeed, WLF's amicus brief in *Dolan* was cited favorably by counsel during the oral argument in that case for the basic principle ultimately adopted by the Court in its opinion, *i.e*, that a rough proportionality is required to be shown between the proposed governmental exactions and the impact of the development.

The Fairness to Land Owners Committee (FLOC) is a national grassroots private property group headquartered in Cambridge, Maryland. FLOC represents over 18,000 "mom and pop" members who are private propertyowners faced with confiscatory federal, state, and local land-use laws and regulations involving wetlands, endangered species, growth management, and other concerns.

FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land. FLOC is active in promoting balanced, fair, and environmentally sensitive legislation that protects property rights. FLOC's public education campaign emphasizes the difference between conservation and confiscation, and its officers and members have testified on numerous occasions before the Congress and state legislatures.

The Pennsylvania Landowners' Association, Inc. (PLA) is a not-for-profit corporation formed in 1987 and based in Waterford, Pennsylvania. PLA is the leading organization in Pennsylvania dedicated to the protection of property rights and economic opportunity while promoting responsible environmental stewardship. PLA has many members in Pennsylvania who are unable to make reasonable use of their land because of wetland restrictions.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy.

FLOC, PLA, and AEF, have also appeared before this Court as amici curiae in *Lucas* and *Dolan*.

Amici submit that the petition presents important issues that thousands of property owners across America face when they try to make reasonable use of their property. Amici can bring a broader perspective to the issues than that presented by the parties, and amici's participation in this case will assist this Court in determining whether to grant the petition.

For all the foregoing reasons, amici curiae WLF, *et al.*, respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: April 22, 1996

TABLE OF CONTENTS

Interests of Amici Curiae 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. The Decision Below Is in Conflict with this Court's Takings Jurisprudence in *Lucas v. South Carolina Coastal Council* and with the Federal Circuit's Decision in *Loveladies Harbor, Inc. v. U.S.*, Thereby Warranting Review under Supreme Court Rules 10(c) and 10 (b) 7

II. The Burden of Persuasion and Proof Should Shift to the Government to Demonstrate What Economically Productive Uses Can Be Made of the Property, Regardless of Whether a Takings Challenge Is Adjudicated under the Categorical Rule in *Lucas* or the Traditional Takings Analysis in *Penn Central* 11

III. The Court Below, and Other Federal and State Courts, Have Misapplied the Investment-Backed Expectations Factor in Determining Whether a Takings Has Occurred 14

Conclusion 19

TABLE OF AUTHORITIES

Cases:

Andrus v. Allard, 444 U.S. 51 (1979) 8, 9

Beure'-Co. v. United States, 16 Cl. Ct. 42 (1988) . 13

Bostock v. Sams, 52 A. 665 (Md. 1902) 16

Ciba-Geigy Corporation v. Dover Township,
553 A.2d 398 (N.J. Super. 1988) 12

Dolan v. City of Tigard,
114 S. Ct. 2309 (1994) 13

Formanek v. United States,
26 Cl. Ct. 332 (1992) 8

Long Island Land Research Bureau v. Young,
159 N.Y.S.2d 414 (Sup. Ct. 1957) 17

Loveladies Harbor, Inc. v. United States,
21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171
(Fed. Cir. 1994) 3, 6, 8, 10

Lucas v. South Carolina Coastal Council,
112 S.Ct. 2886 (1992) 3, 7, 9, 10

Markle v. Grothe,
156 A. 585 (Pa. Super. Ct. 1931) 16

Miller v. City of Beaver Falls,
368 Pa. 189, 82 A.2d 34 (1951) 16

Morris County Land Improvement Co. v. Parsippany Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963) 10

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 18

1902 Atlantic LTD v. Hudson, 547 F. Supp. 1381 (E.D. Va. 1983) 13

Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978) 6, 11

Rau v. Wilden Acres, Inc., 376 Pa. 493, 103 A.2d 422 (1954) 16

Ridgeway Court, Inc. v. Landon Courts, Inc., 442 A.2d 246 (Pa. Super. Ct. 1981) 15

Tess v. Charlerri Home Bldg. Co., 96 Pa. Super. Ct. 505 (1929) 16

White v. Pennsylvania R. Co., 354 Pa. 397, 47 A.2d 200 (1946) 15

Constitution and Statutory Provisions:

U.S. Const., Amend. V 3, 5

Pennsylvania Const., Art. I, sec. 10 3

Miscellaneous:

Anderson, 3 *American Law of Zoning*, (3d ed. 1986) 16

C. McCormick, *McCormick On Evidence* (3d ed. 1984) 12

D. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 The Urban Lawyer 215 (Spring 1995) 15

Sup. Ct. Rule 10(b) 10

Sup. Ct. Rule 10(c) 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1329

CONRAD MOCK and BARBARA MOCK,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION, FAIRNESS TO LAND OWNERS COMMITTEE, PENNSYLVANIA LANDOWNERS' ASS'N, INC., AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTERESTS OF AMICI CURIAE

The interests of amici curiae Washington Legal Foundation, *et al.*, are set out fully in the motion for leave to file accompanying this brief.

STATEMENT OF THE CASE

Petitioners are part owners of a vacant 5.2-acre parcel of land which they purchased in 1963. The land is located in Plumstead Township, Pennsylvania, and is zoned for commercial use, including the use of an automobile repair facility which the petitioners proposed to build. The record is clear that all of the parcels surrounding the Mocks' property are "highly developed with commercial and industrial establishments." Pet. App. 34a. Indeed, one such facility was built on totally filled wetlands *after* the Mocks' purchased their property. Pet. 3.

Petitioners' proposed construction of an automobile repair facility met the township requirements for stormwater management, floodplain use, and erosion and sedimentation control. Although approximately four acres or 80 percent of the parcel are classified as wetlands, petitioners' proposed use of the land would necessitate the filling of only .87 acres of the wetland portion of the parcel.[1] Significantly, there was no feasible way to use only the upland portions of the property for the project without impacting the same amount of wetlands.

Although the impact of the fill on the .87 acre wetland portion would appear to have been sufficiently mitigated by

---

[1] This proposed design of the facility was essentially similar to that proffered by Midas Realty Corporation which offered to pay the Mocks $175,000 for the property contingent on obtaining the necessary permits. The Midas proposal was withdrawn when both the respondent and the U.S. Army Corps of Engineers objected to the filling of any wetland portion of the property. Pet. App. 36a.

petitioners' stormwater management plan, petitioners nevertheless offered, in light of the respondent's initial decision to deny the permit, to mitigate even further. Petitioners proposed (1) to deed-restrict the remaining wetlands, thereby preventing any future development; (2) to plant trees to create a buffer between the site and the remaining wetlands; and (3) to create a costly .38-acre wetland parcel, complete with wetland vegetation, on the rear upland section. Pet. App. 7a; 37a.

Nevertheless, the respondent, Pennsylvania Department of Environmental Resources (DER), issued a final denial of Mocks' application to fill in the small wetland area, without specifying what further exactions or either on-site or off-site mitigation would satisfy DER's concerns about the alleged impacts of the project on the environment.

On appeal from the denial of the fill permit, the Environmental Hearing Board (EHB) found that "without a permit to fill in a portion of the wetlands, [the site] is essentially valueless." Pet. App. 44a. Nevertheless, the EHB ruled on May 1, 1992, that the denial did not effectuate a taking of all or part of petitioners' property, speculating that other development of the property might be possible, which might impact less wetlands, and which might "induc[e] DER to issue a permit." Pet. App. 56a.

The Commonwealth Court of Pennsylvania agreed with the EHB that the land "in its present state is essentially valueless." Pet. App. 22a. However, the court concluded that the denial did not constitute a taking under either the Takings Clause of the Fifth Amendment or its state counterpart, Article I, Section 10 of the Pennsylvania Constitution, despite this Court's intervening decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886

(1992) (holding that a *per se* taking occurs when essentially all economically viable use of property is prohibited).

The Commonwealth Court speculated, as did the EHB, that there may be other uses of the property, such as the building of "museums, libraries, hospitals * * * service and retail shops, and restaurants." Pet. App. 18a.[2] Yet the uncontradicted evidence demonstrated that those proposed uses would entail filling wetlands in the same amount *and even more* than the automobile repair facility because of larger parking area requirements for those facilities. R. 102a (testimony of Russell Benner).

The Commonwealth Court also concluded that no taking occurred under the "traditional takings analysis" which, unlike the categorical finding of a taking, involves a weighing or balancing of several factors, *i.e.*, the character or type of the governmental interference, the diminution of the value of the property, and the extent to which the governmental action interferes with reasonable investment-backed expectations. With respect to the diminution of value, the court again speculated that there may be other uses of the property. The court discounted the Mocks' investment-backed expectations because the property was riparian land. On both these counts, the court rejected jurisprudence to the contrary from the U.S. Court of Federal Claims and Federal Circuit. Pet. App. 22a-25a. Judge James R. Kelley dissented, finding that the

---

[2] The tax authorities were more realistic in their appraisal of the value of the property, having reduced the assessed value of the land almost 90 percent after the permit denial. Pet. App. 44a.

petitioners' property "was rendered economically valueless" and that *Lucas* was dispositive. Pet. App. 28a.

The Supreme Court of Pennsylvania affirmed without opinion the order of the Commonwealth Court.

REASONS FOR GRANTING THE WRIT

This case presents both procedural and substantive issues of exceptional importance to thousands of small property owners across America who face confiscatory restrictions, particularly wetland regulations, on their fundamental right to make reasonable and productive uses of their real property. The basic question is whether a taking of private property under the Fifth Amendment has occurred when a denial of a permit leaves the land essentially valueless, and whether the burden of proving otherwise should be shifted to the government.

Unfortunately, these everyday restrictions on small property owners are unlikely to be reviewed by this or any other court because the owners simply lack the resources to challenge these federal, state, and local regulatory restrictions, and the permitting authorities know it.

For those few property owners who do endeavor to vindicate their rights, cases such as this can easily take ten years or more to adjudicate through the costly administrative and judicial process, and that is *after* the permit has been denied. Wetland fill permit applications are filed and "preliminarily" denied; applicants are forced to hire expensive consultants to re-design the projects and offer mitigation to meet vague and unspecified concerns,

only to have these modified proposals rejected, and so on as the process continues back and forth.[3]

Accordingly, this case presents the Court with a rare but excellent opportunity to clarify its takings jurisprudence which has been misconstrued by lower courts and to give much needed guidance to both permitting authorities and property owners.

This petition should also be granted because the lower court decision radically departed from this Court's decision in *Lucas* when it ruled that there was no categorical takings, and erred as well as in its alternative ruling that no taking occurred under *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). In doing so, the Commonwealth Court also rejected, and thus, is in conflict with, compelling takings jurisprudence from the U.S. Court of Federal Claims and the Federal Circuit, both of which certainly have more expertise in this area of the law than do the courts below.

---

[3] This case began in February 1986 when Midas filed the original permit application. Pet. App. 35a. The denial of the wetland fill permit application in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) occurred in 1982, but the case was not finally adjudicated until 12 years later.

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S TAKINGS JURISPRUDENCE IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* AND WITH THE FEDERAL CIRCUIT'S DECISION IN *LOVELADIES HARBOR, INC. V. U.S.*, THEREBY WARRANTING REVIEW UNDER SUPREME COURT RULES 10(c) AND 10(b).

Just as David Lucas did, the Mocks purchased an empty lot with the expectation of developing their property in accordance with applicable zoning regulations. At the time plans were made to develop their land, the properties surrounding both Mr. Lucas' and the Mocks' lots were already developed in the same manner proposed by the respective owners, *i.e.*, residences in the case of Mr. Lucas, and commercial structures in the case of the Mocks.

The land-use restriction on Mr. Lucas' property was found on its face by this Court to constitute a categorical taking because it denied the owner essentially all "economically beneficial use of land." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 (1992). The land-use restriction in this case as applied was found by the court below to render Mocks' property "essentially valueless."

Yet the Mocks were improperly denied the benefit of this Court's categorical ruling in *Lucas*, because the lower court speculated that there may be other uses of the property. But those other supposed uses would also require the filling of the same, if not more, wetland areas. Under those circumstances, a categorical taking has occurred, unless the proposed use of the property would constitute a nuisance, which it assuredly would not.

Accordingly, amici submit that the petition should be granted under Sup. Ct. Rule 10(c) because the state court "has decided a federal question in a way that conflicts with applicable decisions of this Court."

Amici further submit that this case is also indistinguishable from the facts in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). In that as-applied regulatory takings case, the Federal Circuit applied this Court's categorical rule in *Lucas* to the situation where, as here, a wetland fill permit was denied, thereby rendering the property essentially valueless. The Federal Circuit concluded that a compensable taking had occurred. *See also Formanek v. United States*, 26 Cl. Ct. 332 (1992). However, the majority opinion below erroneously rejected the applicability of *Loveladies* and *Formanek*. These decisions were rendered by courts which amici submit have more expertise than the Pennsylvania courts in takings jurisprudence, especially because they are essentially the only federal courts that decide takings cases.

The court below rejected *Loveladies Harbor, Inc.*, and *Formanek* on the grounds that the reasoning in those decisions -- which rely on the differential in the value of the property with and without the land-use restrictions -- "has not been adopted by the United States Supreme Court." Pet. App. 25a. Rather, the court below chose instead to rely primarily on this Court's decision in *Andrus v. Allard*, 444 U.S. 51 (1979) for the proposition that denial of substantial economic value does not constitute a taking. Pet. App. at 21a, 25a.

The lower court's reliance on *Andrus* is misplaced for several reasons. Most importantly, this Court in *Lucas*

limited the applicability of *Andrus* to personal property, rather than to real property cases:

> [I]n the case of *personal property*, by reason of the State's traditionally high degree of control over commercial dealings, [the property's owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard*, 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). *In the case of land, however*, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

112 S. Ct. at 2889-90 (footnote omitted) (emphasis added).

With respect to the use of real property, this Court has always expressed its "abiding concern for the productive use of, and economic investment in, land." *Lucas*, *supra*, at 2895, n.8; *id.* at 2893 ("economically beneficial or productive use of land").

Furthermore, the use proposed by the Mocks for their property hardly constitutes the highest or best use of their property. Their proposal is quite modest; they wish to use approximately only one acre of their five-acre tract, and have offered to deed-restrict almost three-acres of wetlands which is tantamount to giving the government a conservation easement on their property.

If the Pennsylvania Department of Environmental Resources had instead given the Mocks a wetland fill permit, but the federal government (which has concurrent jurisdiction over wetlands) had refused, then petitioners' inverse condemnation claim would likely have been favorably decided in the U.S. Court of Federal Claims under *Loveladies Harbor*. The redress of important constitutional rights should not be so dependent upon the fortuity of the judicial forum in which a property owner finds his or her case.

Supreme Court Rule 10(b) states that one of the reasons for deciding whether to grant a petition for writ of certiorari is when "a state court of last resort has decided a federal question in a way that conflicts with the decision of another court of last resort or of a United States court of appeals." Amici submit that the Supreme Court of Pennsylvania, by affirming the Commonwealth Court, has decided an important federal question that conflicts with the United States Court of Appeals for the Federal Circuit, as even acknowledged by the Commonwealth Court. The conflict is not simply with any court of appeals, but the very one Congress has selected to adjudicate these kinds of cases.[4]

---

[4] The decision below is also inconsistent with the forceful decision in *Morris County Land Improvement Co. v. Parsippany Troy Hills Township*, 40 N.J. 539, 552-553, 193 A.2d 232, 239 (1963) (law prohibiting filling of wetlands except under "exceedingly difficult conditions" constituted a taking). *Morris County* was cited favorably in *Lucas*, 112 S.Ct. at 2895.

II. THE BURDEN OF PERSUASION AND PROOF SHOULD SHIFT TO THE GOVERNMENT TO DEMONSTRATE WHAT ECONOMICALLY PRODUCTIVE USES CAN BE MADE OF THE PROPERTY, REGARDLESS OF WHETHER A TAKINGS CHALLENGE IS ADJUDICATED UNDER THE CATEGORICAL RULE IN *LUCAS* OR THE TRADITIONAL TAKINGS ANALYSIS IN *PENN CENTRAL*.

Essentially, the court below and many other courts have allowed federal and state regulatory authorities to deny property owners the right to make reasonable use of their property without a finding of a taking, because there is always some hypothetical and unspecified use of the property. That excuse is often unfairly used to justify either a refusal to hear a takings challenge because it is unripe, or to deny the takings claim on the merits because the property owner has not proven that every conceivable use of the property would be foreclosed by application of the land-use restriction. *See* Pet. App. 18a, 22a ("we accept the board's finding that the land in its present [wetland] state is essentially valueless * * * [but] there is no evidence in the record that the land cannot be put to economically viable use.").

The property owner is forced to play a costly guessing game with the authorities: what mitigation efforts would satisfy the authorities and what economically viable use of the property can be made? The authorities have absolutely no incentive to answer these questions. They assume no burden of having to show what economically viable use of the property can be made, thereby leaving the status of the property in a state of limbo, precisely where they want it.

The owner cannot sell the property because of the uncertain cloud on the property due to the presence of wetlands. The inordinate delays and permit denials thus constitute a *de facto* conservation easement on the property without the government having to pay for it.

The petitioners should not be forced to make an infinite series of costly permit applications in the vain hope of establishing that all metaphysically conceivable uses of the land have been precluded. Traditional zoning law does not place such a burden on the Mocks, however. *See, e.g., Ciba-Geigy Corporation v. Dover Township*, 553 A.2d 398, 404 (N.J. Super. 1988) (ordinance rezoning a hazardous waste site to a "preservation reclamation" zone held a taking because it did not accord the property owners a reasonable use permitted by right).

By having a permit denied, and by showing that the denial renders the property economically useless, the property owner has made a prima facie case of a categorical taking under *Lucas*. At that point, the burden should shift to the government of showing that either the proposed use constitutes a nuisance, or that other economically viable uses can be made of the property.

Given the permitting agency's alleged competence in this field, it is reasonable to shift to the agency the burden of going forward with a description and quantification of the interests concerned, the manner in which the Mocks proposed use of their land will interfere with those interests, and what the Mocks may do to accommodate the Commonwealth's interest while still retaining economically productive use of the land. See C. McCormick, *McCormick On Evidence* § 338 (3d ed. 1984); *id.* § 318 ("where facts pleaded by one party lie peculiarly in the

knowledge of the adversary, the latter has the burden of proving it").

This Court similarly shifted the burden to the government in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) to demonstrate that development exactions are "roughly proportional" to the environmental impact the development would have on the site. At least in the *Dolan* context, property owners have the benefit of being told by the permitting agencies specifically what mitigation efforts would be required in order to develop their property. In such a case, the owner (and a court) can objectively determine whether there is a "rough proportionality" between those requirements and the impact of the project.

While an objective formula for balancing public and private interests in wetland cases may at times be difficult to achieve, common sense (and environmental science) tells us that the public interest in protecting a wetland that is classified as an unreclaimed borrow pit (*1902 Atlantic LTD v. Hudson*, 547 F. Supp. 1381 (E.D. Va. 1983) is significantly less than that in protecting a rare calcareous fen (*Beure'-Co. v. United States*, 16 Cl. Ct. 42 (1988)). In the instant case, the wetlands on the Mocks' property were found by the EHB not to be important ones. Pet. App. 51a.

In the instant case, the property owner is doubly burdened: the owner is not only not told in as objective a manner as possible what the agency believes the quantifiable impacts of the project are, but also is left to

guess at his or her peril what mitigation efforts would satisfy the permitting authorities.[5]

Accordingly, this Court should grant the petition to decide this important federal question that is present in almost every takings challenge.

III. THE COURT BELOW, AND OTHER FEDERAL AND STATE COURTS, HAVE MISAPPLIED THE INVESTMENT-BACKED EXPECTATIONS FACTOR IN DETERMINING WHETHER A TAKINGS HAS OCCURRED.

Amici submit that the court below and other courts have seriously misconstrued the reasonable investment-backed expectations factor that is referred to in this Court takings jurisprudence, and the relationship of that factor to the economic devaluation of the property due to the regulation or governmental restriction. For that reason

---

[5] For example, if the principle concern is that the value of these particular wetlands serve to retain storm water, the owner can offer to build storm water detention basins equivalent to the capacity of the wetlands (which apparently was done in this case). In that regard, a simple one-for-one replacement value is not always necessary. Thus, the storm water value of the .83 acre of a wetland in this case could be compensated by a properly constructed detention basin that may be only one-fourth that size. If the concern is wildlife habitat, the permitting authority should be required to show what impact the fill would have on certain species, and whether that concern could be addressed by the owner, such as Mocks' proposed planting of trees and the creation of a .38 acre vegetated wetland.

alone, this Court should clarify the role of investment-backed expectations in takings cases.[6]

The lower court took the petitioners to task for not presenting evidence of what their investment-backed expectation were in 1963 when they purchased the property, and further indicated that the Mocks "could not reasonably expect to develop their land free from government regulation because it is riparian land, which has been subject to regulation for centuries * * * but is also within the 100-year floodplain, as designated by the local zoning ordinance." Pet. App. 23a.

The EHB's reliance in this regard on *White v. Pennsylvania R. Co.*, 354 Pa. 397, 47 A.2d 200 (1946) was misplaced. Pet. App. 55a. *White* was concerned with the alteration of the flow of water contained within a defined channel. In this case, the project would not alter the flow of Pine Run Creek meandering through the northern boundary of Mocks' property. A more relevant authority is *Ridgeway Court, Inc. v. Landon Courts, Inc.* 442 A.2d 246 (Pa. Super. Ct. 1981) which dealt with the liability of landowner to neighbors for flooding due to the diversion of surface waters incident to ordinary development.

---

[6] *See* D. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 The Urban Lawyer 215 (Spring 1995) ("Unfortunately, the Court is confused about the meaning of [investment-backed expectations], federal and state courts divide on how to apply it, and its role in taking law remains a puzzle.").

> One may make improvements upon his own land, especially in the development of urban property, grade it, and built [sic] upon it, *without liability for an incidental effect upon adjoining property even though there may result some additional flow of surface water thereon through a natural watercourse*, but he may not, by artificial means, gather the water into a body and precipitate it upon his neighbor's property.

442 A.2d at 247-48 (citing *Rau v. Wilden Acres*, 376 Pa. 493, 103 A.2d 422 (1954) (emphasis added). Other authority acknowledge the right of a property owner to the "rational, proper and profitable use" of land within the context of surface water rights. *See, e.g., Markle v. Grothe*, 156 A. 585, 586 (Pa. Super. Ct. 1931).

Pennsylvania, as do many other states, follows the civil rule with respect to surface waters. In addition, it is said that an individual may grade land and clear it of brush and trees to render it suitable for cultivation or for development. *Tess v. Charlerri Home Bldg. Co.*, 96 Pa. Super. Ct. 505 (1929). The common law courts of Pennsylvania thus have long recognized the right of property owners such as the Mocks to develop their property for the "natural uses" which are the "common and necessary use" of the land. *E.g., Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951).

The right to build on one's own land is an important right under common law in most if not all states. *See, e.g., Bostock v. Sams*, 52 A. 665 (Md. 1902); Anderson, 3 *American Law of Zoning*, 20.56 at 292 (3d ed. 1986)("[a] landowner has the right to develop his land; he is not required to sell it."). As one court aptly put it:

> True, a line always exist beyond which the erection of a dwelling, or place of business * * * may become detrimental to the general welfare, but in such cases the municipality is bound to compensate the owner if it proposes, in the public interest, to bar his property from any practical use for which it might be suited. It cannot compel him to sell it to an adjoining owner nor can it require him to purchase additional contiguous property, if it is available. Rather, it must itself acquire the property by purchase or condemnation since, in effect, it is a taking for a public purpose.

Long Island Land Research Bureau v. Young, 159 N.Y.S.2d 414, 417 (Sup. Ct. 1957).

In short, a property owner has the same right to use his land as his neighbors. In this case, all of the property adjacent to petitioners' lot has been commercially developed; indeed, the adjacent medical facility was built totally on wetlands *after* the Mocks purchased their lot.

While some have suggested that the common law cannot be frozen in its 19th century incarnation, it is also true that not every aspect of society has changed. There is, in other words, still good reason to be concerned about the rights of homeowners, shop keepers, and small businessmen. In that regard, the Mocks' modest plan to build an automobile repair shop on their property is nothing more than a 20th century version of the livery stable.

Significantly, the Mocks' proposed project satisfied all riparian and floodplain concerns. The denial of the permit was based solely on DER's wetland regulations which are of recent vintage. The government should not be allowed

to piggy-back a post-purchase regulatory scheme that is confiscatory in nature on top of a pre-purchase regulatory scheme whose conditions have been met or could be foreseeably met, and then argue that the later-imposed confiscatory scheme justifiably diminishes the property owners' investment-backed expectations.

Petitioners' general investment expectations in 1963 when they purchased the commercially developable lot became more reasonable, not less, as adjacent commercial development progressed over the last 30 years.

Secondly, even if the wetland restrictions existed before the Mocks' purchased their property, clearly that would not defeat an inverse condemnation claim. A similar argument was made and rejected in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) where the Court, noting the difference in the analysis between the personal property and real property, stated, "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in the conveying the lot." *Id.* at 833, n.2.

If the law were otherwise, the government would always be free to impose confiscatory regulations and take the property of all those who failed to challenge the regulation within the statute of limitations or prior to transferring the property either by sale, gift, or devise.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: April 22, 1996

MOTION FILED

APR 22 1996

5

No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MR. AND MRS. CONRAD MOCK,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

Joan T. Ochoa
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

Of Counsel

Mary V. DiCrescenzo*
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

**Counsel of Record*

18 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1329

MR. AND MRS. CONRAD MOCK,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner.

The NAHB has received the Petitioner's written consent to file this brief as *amicus curiae* in support of the Petitioner and has filed the letter of consent with the Clerk of this Court. The Respondent has declined our request for consent to file a brief in support of the petition.

The NAHB represents 185,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause of the Fifth Amendment serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this *amicus* and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for government action that results in a taking of private property is critical to landowners who either (1) have lost all reasonable economic use of their property solely in order to serve broader public (*i.e.*, governmental) interests, or (2) are faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by the Department of Environmental Resource's (DER) denial of a fill permit for less than one acre of the wetlands situated on the Petitioners' property. Without such a permit, the Petitioners have been unable to make any economically viable use of their property.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to property owners in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[1] *First English Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Dolan v. City of Tigard*, ____ U.S. ____, 114 S.Ct. 2309 (1994). The NAHB submits the attached brief to the Court to clarify the rules that must be applied in cases where a property owner has been denied economically viable use of his or her land.

This *amicus* believes that the accompanying brief will assist the Court because its concerns are much broader than those of petitioners. The NAHB's members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land and the ability to provide society with

---

[1] The Court's opinion cited the NAHB's brief, 483 U.S. at 840.

necessary and affordable shelter. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While the petitioners focus their argument on the harm DER has inflicted on them, our brief addresses the broader mandates of takings law that should be applied when government decisions abuse private rights and cites authorities different from those in Petitioner's brief.

For the above reasons, this Motion should be granted.

Respectfully submitted,

/s/ Mary V. DiCrescenzo

MARY V. DICRESCENZO
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

Counsel for *Amicus*

April 22, 1996

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE REASONS FOR GRANTING THE WRIT 1

REASONS FOR GRANTING THE WRIT 3

I. Law and Logic Require that the Burden of Production Shift to the Government When a Property Owner Establishes a Categorical Taking Resulting from a Government Action that Denies the Owner Economically Viable Use of His or Her Property 3

II. The Denial of a Permit Left the Petitioners With No Economically Beneficial or Productive Use of Their Land and Thus Constituted a Categorical Taking Requiring the Payment of Just Compensation 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES	PAGE(S)
Agins v. City of Tiburon, 447 U.S. 255 (1980)	7
Andrus v. Allard, 444 U.S. 51 (1979)	2
Armstrong v. United States, 364 U.S. 40 (1960)	10
Bowles v. United States, 31 Fed. Cl. 37 (1994)	6. 10
Dolan v. City of Tigard, ____ U.S. ____, 114 S.Ct. 2309 (1994)	7
Florida Rock Industries, Inc. v. U.S., 21 Cl.Ct. 161 (1990)	6
Hendler v. U.S., 952 F.2d 1364 (Fed. Cir. 1991).	10
Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981)	7
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	7
Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987)	7
Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153 (1990)	6
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994)	9
Lucas v. South Carolina Coastal Council, 508 U.S. 1003 (1992)	3, 4, 7-10
Mock v. Department of Environmental Resources, 154 Pa.Cmwlth. 380, 623 A.2d 940 (1993)	5
Nollan v. California Coastal Commn., 483 U.S. 825 (1987)	7
Olson v. U.S., 292 U.S. 246 (1934)	6
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	7
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	2

PAGE(S)

Powers v. Skagit County, 67 Wash.App. 180, 835 P.2d 230 (1992) 9

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (dissenting opinion) 7

United States v. 341.45 Acres of Land, 633 F.2d 108 (8th Cir. 1980) 6

CONSTITUTIONAL PROVISIONS

United States Constitution, Amend. V 1, 2, 10

United States Constitution, Amend. XIV 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1329

MR. AND MRS. CONRAD MOCK,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Just Compensation Clause of the Fifth Amendment, and its implementation as a shield against oppressive governmental land use regulation, is of paramount importance to the members of the National Association of Home Builders. Our members are constantly involved in the purchase, sale, improvement, and use of vast amounts of privately-held land in the United States. The Constitutional guarantee of compensation for the governmental action or regulation that results in a taking is critical to landowners who have been denied all economically

viable use of their property so that their property may be used to serve broad public or governmental interests. This case presents an example of precisely this type of governmental imposition. Here, as determined by the Pennsylvania Environmental Hearing Board (Board), the Department of Environmental Resource's (DER) denial of the Petitioners' permit application resulted in the loss of all economically viable use of the Petitioners' property. The end result is a *de facto* conversion of private property into a public wetland preserve, without the payment of Just Compensation. While the preservation of wetlands is a legitimate public goal, the Fifth and Fourteenth Amendments of the United States Constitution require that the public pay for the value of land that is preserved in its natural state on behalf of the public, rather than forcing the individual landowner to bear the public burden alone.[2]

The Board, the Pennsylvania Commonwealth Court ("Commonwealth Court"), and the Pennsylvania Supreme Court ("Pa. Supreme Court") misapplied important precepts of law in denying the Petitioners' takings claim. While the Board and the Commonwealth Court acknowledged that the denial of the Petitioners' permit application rendered the Petitioners' land valueless, both tribunals ignored the Constitutional implications of such a determination by failing to find that a taking occurred thereby necessitating the payment of just compensation, as required by the Fifth Amendment. Instead, the Board, the Commonwealth Court, and the Pa. Supreme Court are under the illusion that, contrary to the unrebutted evidence presented at the hearing, some other undefined use might be made of the property, and placed on the Petitioners the untenable burden of attempting to find that illusory use. In essence, the Board and both Pennsylvania courts are requiring that the petitioners prove a negative — an impossible task — in order to establish their takings claim.

---

[2] *Andrus v. Allard*, 444 U.S. 51, 65 (1979). *See also, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[T]he question at bottom is upon whom the loss . . . should fall.")

The case should never have reached this stage. The findings of the Board were clear: without the permit, the land is essentially valueless. The Commonwealth Court acknowledged this simple fact; therefore, its only task should have been to follow this Court's precepts in *Lucas v. South Carolina Coastal Council*.[3] Specifically, once a finding has been made that a governmental action has left a property owner with no economically viable use for his or her property, a reviewing court should simply determine the amount of compensation owed the landowner. Furthermore, once a property owner establishes a prima facie case for a categorical taking, as the Petitioners did here, the burden of production must shift to the government to demonstrate that reasonable, economically feasible alternatives to the owner's proposed use are available. If the government agency cannot satisfy the reviewing court that such uses exist, compensation must be awarded.

Protecting the environment is an important goal in maintaining society's quality of life. Nevertheless, government must recognize and respect property rights. Anything short of that proper respect, as occurred here, is repugnant to the more fundamental concepts of due process of law expressed in the Constitution. The petitioner's current situation is one that is, unfortunately, familiar to property owners across the country. Therefore, it is essential that this Court issue a writ of certiorari so that it will have the opportunity to clarify for the lower courts the rules that must be applied when it is determined that a categorical taking has occurred.

REASONS FOR GRANTING THE WRIT

I. Law and Logic Require that the Burden of Production Shift to the Government When a Property Owner Establishes a Categorical Taking Resulting From a Government Action

---

[3] 505 U.S. 1003, 112 S.Ct. 2886 (1992).

that Denies the Owner Economically Viable Use of His or Her Property

A requirement that the Petitioners prove a negative! This is the impossibility that was imposed on the Petitioners by the Board and the Pennsylvania courts. It is the essence of this case.

Similar to countless individuals across the country, the Petitioners purchased land as a long-term investment. When it came time to develop their property, the Petitioners, like so many other landowners, learned that new regulations were in place restricting development. In the case of the Petitioners, the regulations were designed to protect wetlands. In order to develop their land, the Petitioners needed a fill permit from the DER that would allow them to fill less than one acre of the wetlands that are located on their property. The DER's denial of the permit prevented them from constructing the proposed automotive repair facility and left the Petitioners with no economically viable use of their property.[4]

The refusal of the Board and the Pennsylvania courts to find a taking in this case is based upon the erroneous and unsupported conclusion that some use other than the Petitioners' proposed automobile repair shop could be made of the property. This conclusion was reached irrespective of the unrebutted evidence presented at the hearing and after acknowledgment of the fact that without the requested permit, the Petitioners' land was essentially valueless. As noted in the petition for a writ of *certiorari*, the Board made the following specific finding:

---

[4] In *Lucas* this Court outlined two types of regulatory actions that are to be considered a categorical taking. The first type encompasses those regulations that " . . . compel the property owner to suffer a physical 'invasion' of his property . . . " The second type of action is where a regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893.

> The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 . . . or more.

Despite this explicit finding, the Board denied the Petitioners' takings claim on the irreconcilable premise that there could be "some other" use made of the property. This error was then repeated by the Commonwealth Court:

> Therefore, although we accept the board's finding that the land in its present state is essentially valueless, the Mocks failed to prove that their land lost all of its residual value when the department denied their fill permit.[5]

The Commonwealth Court then compounded its error by suggesting alternative uses for the site without any regard for their economic feasibility or suitability of the land for the suggested uses.[6] The Court should never have taken this leap into speculative land development. The Petitioners had already established a prima facie case for a categorical taking: when the permit that would allow them to build an automobile repair shop was denied, they lost all economically viable use of their land. Any production of evidence for an alternative development was, at that point, the responsibility of the DER.

The shifting of the burden of production to the government once a prima facie categorical takings case has been established is supported by case law and logic. Requiring a property owner to search out and demonstrate the impossibility of use after use and thereby once again prove a total absence of value "would make

---

[5] *Mock v. Dept. of Environmental Resources*, 154 Pa.Cmwlth. 380, 396, 623 A.2d 940, 949 (1993).

[6] Specifically, the court suggested:

. . . museums, libraries, hospitals, nursing homes, medical and other office buildings, recreational and municipal facilities, service and reatil shops, and restaurants. *Mock*, 154 Pa.Cmwlth. at 392, 623 A.2d at 947.

an illusion out of the fifth amendment. Instead, plaintiff's initial burden is to produce sufficient evidence of the absence of real value to shift the burden to defendant."[7] Indeed, as the Court of Federal Claims noted, "[c]ommon sense, however, indicates the impossibility of requiring the [property owner] to prove a negative."[8] Instead, the landowner must produce sufficient evidence (i.e., a prima facie case) that it is more likely than not that there remains no economically viable use for the property. Once the burden shifts, the government must then rebut the showing or the property owner prevails.

The government cannot meet this burden by merely reciting the uses listed for a given parcel of land in the local zoning code. While a variety of uses for a particular site may be permitted by the zoning code, those uses are often not feasible. To meet its burden of production, the government must establish available uses for the property that are physically feasible and economically viable. Also, there must be "a demand for such use in the reasonably near future."[9]

The shifting of the burden of production to the government in cases of categorical takings is both reasonable and logical. Requiring a landowner, after the landowner has established that his or her property is rendered valueless as a result of government action, to demonstrate that an endless stream of alternative uses are inappropriate for the site and, oftentimes, will result in rejection by the government for reasons similar to the rejection of the original application, is absurd. Common sense

---

[7] *Florida Rock Industries, Inc. v. U.S.*, 21 Cl.Ct. 161, 170 (1990).

[8] *Loveladies Harbor, Inc. v. U.S.*, 21 Cl.Ct. 153, 157-8 (1990). *See also, Bowles, v. U.S.* ("It would be patently unreasonable, and logically impossible, to require plaintiff to prove a negative — that [the property] has no value. In this case the court finds that plaintiff has produced sufficient evidence to establish a prima facie case and shift the burden of production to defendant."), 31 Fed. Cl. 37, 45 (1994).

[9] *Loveladies Harbor*, 21 Cl. Ct. at 158 (quoting *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980), *cert. denied sub nom.* See also *Olson v. U.S.*, 292 U.S. 246 (1934).

demands that the burden of production shift to the government in these circumstances.[10]

II. The Denial of a Permit Left the Petitioners With No Economically Beneficial or Productive Use of Their Land and Thus Constituted A Categorical Taking Requiring the Payment of Just Compensation

The Pennsylvania courts' reviews of the takings issue were limited to whether the Board's findings were supported by substantial evidence and whether the Board, in reaching its decision, committed any errors of law. Both courts found that the Board's findings were supported by substantial evidence and that no errors of law were made. However, these conclusions were simply wrong as the Board failed to recognize that a constitutional violation had occurred as a result of the DER's denial of the Petitioners' application for a fill permit. This violation continues today due to the Pennsylvania courts' misapplication of this Court's decision in *Lucas v. South Carolina Coastal Council*.[11]

Lucas reiterated the long-standing principle of law that a taking occurs if a governmental regulation or action denies a property owner economically viable use of his or her property.[12] Those governmental actions that fall into this category and leave

---

[10] As Petitioners state in their petition for certiorari, requiring the government to meet this burden of production is no different than the precepts established by this Court in *Dolan v. City of Tigard*, ____ U.S. ____, 114 S.Ct. 2309 (1994), where the Court held that in order for a government exaction of property to stand, the government must demonstrate that the exaction imposed as a condition to development is roughly proportional to the impact of that development.

[11] 505 U.S. 1003, 112 S.Ct. 2886 (1992).

[12] This principle stems from a long line of Supreme Court opinions, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Commn.* 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981), *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (dissenting opinion).

a property owner without an economically beneficial or productive use of his or her land are automatically considered a taking and require the payment of just compensation without inquiry into the government's intent.[13]

The Pennsylvania courts, struggling to escape the confines of *Lucas*, reasoned that Mr. Lucas was subjected to a regulation that prohibited all development, while in the Petitioners' case, the government action denied only the specific project. *Lucas* itself refutes this premise since Mr. Lucas was also denied the ability to proceed with a specific project, *i.e.*, the construction of two homes. Both the Petitioners' permit denial and the South Carolina statute produced the same result: a denial of all economically viable use. Hence, a categorical taking occurred in both instances.

In any event, this is a distinction without a difference. Whether the government action complained of is a permit denial or a blanket regulation prohibiting all use is immaterial. The correct focus for the reviewing court is on the effect the government action has on the landowner. In Mr. Lucas' case, the state of South Carolina enacted a statute that barred him from building homes on two lots that he purchased two years before the enactment. As a result, he was denied all economically viable use of his property. In the Petitioners' case, the DER denied their application for a permit to fill less than one acre of wetlands in order to build an automobile repair shop. This permit denial left the Petitioners in the same situation as Mr. Lucas — with a tract of land that is essentially valueless.

The question of whether a governmental action or regulation results in a taking of private property must be analyzed in terms of the impact of the action on the property owner's reasonable investment-backed expectations. These expectations are based on state law of property and nuisance.

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we

---

[13] *Lucas*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893.

> think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords with our takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.[14]

In the present case, the Petitioners' reasonable investment-backed expectations are clear. They first purchased the property in 1963 as a long-term investment. The land was zoned commercially and in a rapidly developing area. The Petitioners had every reason to believe they could build a project, such as the automobile repair facility that is the subject of this case, at the time of purchase. Indeed, absent the wetlands, current and prior zoning allows for the Petitioners' intended use of their property.

In a factually similar case, *Lucas* was recently applied by the Federal Circuit Court of Appeals. In *Loveladies Harbor, Inc. v. United States*,[15] the Court upheld an award of compensation to a property owner who was denied a wetlands permit by the Army Corps of Engineers. Like the Petitioners, Loveladies Harbor suffered a loss of all economically beneficial use as a result of that permit denial. The Federal Circuit found that a regulatory taking had occurred and ordered the payment of Just Compensation.[16]

---

[14] *Lucas*, 505 U.S. at 1027, 112 S.Ct. at 2899.

[15] 28 F.3d 1171 (Fed. Cir. 1994).

[16] The *Lucas* principles were also acknowledged and adopted as a threshold inquiry for regulatory takings cases by the Washington Court of Appeals in *Powers v. Skagit County*, 67 Wash.App. 180, 835 P.2d 230 (1992): *Lucas* mandates compensation for a taking whenever land use restrictions deny a landowner of all economically viable use of his property, unless the restriction is one that background principles of [the] State's law of property and nuisance already place upon ownership. *Id.*, 67 Wash.App. 180, 190, 835 P.2d 236.

Based upon the facts of this case, the Pennsylvania courts should have reached the same conclusion as the Federal Circuit. As this Court warned,

> Regulations that leave the owner of land without economically beneficial or productive options for its use . . . by requiring land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service.[17]

It is clear that the DER's denial of the Petitioners' permit application forces the Petitioners to bear a burden to protect the state's natural resources, which burden should be borne by the public. Such a burden should not be placed on property owners who are unfortunate enough to find that the state has declared their land a natural resource requiring protection. If the state feels that the property is so important to keep in its natural state, it should compensate the Petitioners for their loss. The takings clause of the Fifth Amendment "is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18]

As the Court of Federal Claims recently stated, "[w]hat emerges from the case law at a constitutional minimum is that under the guise of regulation government cannot take from a property owner the core value of the property, leaving the owner with only a hollow deed."[19]

---

[17] *Lucas*, 505 U.S. at 1018, 112 S.Ct. at 2894.

[18] *Armstrong v. United States*, 364 U.S. 40 (1960).

[19] *Bowles v. U.S.*, Fed.Cl. 37, 45 (1994) citing *Hendler v. U.S.*, 952 F.2d 1364, 1373 (Fed. Cir. 1991).

CONCLUSION

For all of the reasons stated above and in the Petition for Certiorari, the NAHB respectfully urges this Court to issue a writ of certiorari to review the judgment and opinions of the Supreme Court and Commonwealth Court of Pennsylvania.

Respectfully submitted,

MARY V. DICRESCENZO
Counsel of Record
National Association of Home Builders
1201 15th Street, N.W.
Washington, DC 20005
(202) 822-0291

Dated: April 22, 1996